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No. 660

In the Supreme Court of the United States

OCTOBER TERM, 1935

THE UNITED STATES OF AMERICA, APPELLANT.

v.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Specification of errors	15
Summary of argument	17
Argument:	
I. Appellee's interest within the meaning of the Commodities Clause in the commodities owned by the producing companies is established by reason of the combination in the United States Steel Corporation, a holding company, of all of the stock of appellee and of the producing companies	23
II. The weight of the evidence establishes that the United States Steel Corporation in practice actively exercises the power of control vested in it by its ownership of the stock of appellee and of the producing subsidiaries to manage and to direct their affairs as departments and branches of one industrial organization	39
1. Introductory	41
2. Management, offices and counsel	50
Formation of the Steel Corporation	50
Interlocking directors, 1901–20	51
Method of selecting appellee's officers and directors	52
Declaration of dividends	54
Directors' approval of contracts	57
Location of offices	57
Division counsel	58
Meetings of presidents	59
3. Control of capital expenditures	60
4. Control of surplus funds: the advance account	65
5. Control of the clearing of inter-subsidiary transactions	68
6. Bonus Plan, Pension Plan, and Stock Purchase Plan	70
Bonus Plan	70
Pension Plan	72
Stock Purchase Plan	73

Argument—Continued.
II—Continued. Page
7. Reports, budget estimates, inter-subsidiary purchases, and bank accounts ---- 73
Reports ---- 73
Budget estimates ---- 74
Inter-subsidiary purchases ---- 75
Bank accounts of subsidiaries ---- 78
8. Trackage agreement with the Chicago and Eastern Illinois Railroad Company ---- 79
9. Lease of Lake Shore and Eastern Railway Company ---- 85
10. Conclusion ---- 100
III. There is nothing in (a) the character of the transportation service which appellee performs for the producing subsidiaries of the United States Steel Corporation or (b) the manner in which appellee's affiliation with such subsidiaries exists, i. e., through the combination of their stock in a holding company, which prevents the Commodities Clause from being applicable to the transportation of the commodities in question ---- 103
(A) As to the character of the transportation service which appellee performs for the Steel Corporation subsidiaries ---- 105
(B) As to the manner of appellee's affiliation with the producing subsidiaries ---- 114
(1) Section 15 (13) of the Interstate Commerce Act ---- 121
(2) Legislative history of the Commodities Clause ---- 138
(3) Construction by the Attorney General ---- 145
Conclusion ---- 148

CITATIONS

Cases:

Adriatic Mining Co. v. *C. & N. W. Ry. Co.*, 78 I. C. C. 611 ---- 138
Allowances for Stacking, 179 I. C. C. 780 ---- 131
Allowances to Elevators by U. P. R. R., 12 I. C. C. 85 ---- 131
Allowances to Kanawha, Glen Jean & Eastern, 41 I. C. C. 53 ---- 132
American Steel & Wire Co. v. *Newburgh & S. S. Ry. Co.*, 55 I. C. C. 353 ---- 129
Armour & Co. v. *E. P. & S. W. Co.*, 52 I. C. C. 240 ---- 131
A. T. & S. F. Ry. Co. v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92 ---- 131
Benwood & Wheeling Connecting Ry. Co. v. *P. C. C. & St. L. R. R. Co.*, 62 I. C. C. 357 ---- 129
Brimstone R. R. Co. v. *United States*, 276 U. S. 104 ---- 130

Cases—Continued. Page

Buffalo Union Furnace Co. v. *L. S. & M. S. Ry. Co.*, 21 I. C. C. 620 131
Campbell's Creek Coal Co. v. *A. A. R. R. Co.*, 29 I. C. C. 682 138
Carnegie Steel Company v. *Director General*, 80 I. C. C. 269 129
Central R. R. Co. of New Jersey v. *United States*, 229 Fed. 501, cert. den. 241 U. S. 658 131
Class Rates from Chestnut Ridge Railway Stations, 41 I. C. C. 62 134
Construction of Line by Jefferson Southwestern, 86 I. C. C. 796 ..... 134, 135
Del., Lack. & West. R. R. v. *United States*, 231 U. S. 363 38
Donner Steel Co. v. *D. L. & W. R. R. Co.*, 57 I. C. C. 745 131
Duplex Co. v. *Deering*, 254 U. S. 443 140
Finkbine Lumber Co. v. *Gulf & S. I. R. Co.*, 269 Fed. 933, cert. den., 255 U. S. 574 ..... 128, 131
Florida v. *United States*, 282 U. S. 194 38
Galveston Export Co. v. *T. & F. S. Ry. Co.*, 96 I. C. C. 141 131
General Electric Co. v. *N. Y. C. & H. R. R. R. Co.*, 14 I. C. C. 237 131
New York Central & H. R. R. R. Co. v. *General Electric Co.*, 219 N. Y. 227, 114 N. E. 115, certiorari denied, 243 U. S. 636 131
In the Matter of Divisions of Joint Rates and other Allowances to Terminal Railroads, 10 I. C. C. 385 86
Industrial Railways Case, 29 I. C. C. 212 125
Industrial Railways Case, 32 I. C. C. 129 ..... 126, 133
Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42 ..... 125, 131
Jones & Laughlin Steel Co. v. *Director General*, 60 I. C. C. 325 129
Jones & Laughlin Steel Co. v. *P. & L. E. R. R. Co.*, 53 I. C. C. 556 129
Lackawanna Steel Co. v. *S. B. Ry. Co.*, 56 I. C. C. 684 129
Manufacturers Railway Co. v. *St. L., I. M. & S. Ry. Co.*, 28 I. C. C. 93, 21 I. C. C. 304, 32 I. C. C. 100 126–127
Manufacturers Ry. Co. v. *United States*, 246 U. S. 457 127
Merchants Cotton Press & Storage Co. v *I. C. R. R. Co.*, 17 I. C. C. 98 131
Merchants Warehouse Co. v. *United States*, 283 U. S. 501 131
Morgantown & Kingwood Divisions, 49 I. C. C. 540 130
Mumby Lbr. & Shingle Co. v. *Chicago, M. St. P. & P. Ry. Co.*, 200 I. C. C. 261 131
National Malleable Castings Co. v. *P. & L. E. R. R. Co.*, 51 I. C. C. 537 ..... 128, 129, 131
National Tube Co. v. *Lake Terminal R. R. Co.*, 55 I. C. C. 469 129

Cases—Continued. Page

New England Divisions Case, 261 U. S. 184 130
Northern Securities Co. v. *United States*, 193 U. S. 197 36
O'Keefe v. *United States*, 240 U. S. 294 ..... 126, 127, 142
Pneumatic Scales Corporation v. *A. & R. R. R. Co.*, 51 I. C. C. 686 131
Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11 131
Second Industrial Railways Case, 34 I. C. C. 596 133
Solvay Process Co. v. *D., L. & W. R. R. Co.*, 14 I. C. C. 246 .. 131
Standard Oil Co. v. *United States*, 221 U. S. 1 36
Sterling & Son Co. v. *M. C. R. R. Co.*, 21 I. C. C. 451 131
Tap Line Cases, 234 U. S. 1 ..... 125, 126, 127, 141
Texas & P. R. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426 .. 38
Texas & P. Ry. Co. v. *Thompson*, 288 Fed. 167 128
The Alaska Investigation, 44 I. C. C. 680 138
The Tap Line Case, 23 I. C. C. 277 125
The Tap Line Case, 23 I. C. C. 549 125
The Tap Line Case, 31 I. C. C. 490 126
United States v. *Butler County R. R. Co.*, 234 U. S. 29 127
U. S. v. *Delaware & Hudson Co.*, 213 U. S. 366 ..... 26, 28, 111, 112, 113, 116, 144, 147
United States v. *Del., Lack. & West. R. R.*, 238 U. S. 516 .. 18, 23, 33, 38, 41, 116, 117, 120
United States v. *Lehigh Valley R. R. Co.*, 220 U. S. 257 .. 116, 118
United States v. *Lehigh Valley R. R. Co.*, 254 U. S. 255 117
United States v. *Reading Co.*, 253 U. S. 26 ..... 18, 19, 25, 26, 27, 29, 30, 32, 35, 36, 39, 41, 49, 101, 115, 120
United States v. *Reading Co.*, 226 Fed. 229 ..... 27, 33
United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77 140
United States v. *Trans-Missouri Freight Association*, 166 U. S. 290 140
United States v. *U. S. Steel Corp.*, 251 U. S. 417 36
Virginian Railway v. *United States*, 272 U. S. 658 38
Wisconsin R. R. Comm. v. *C., B. & Q. R. R. Co.*, 257 U. S. 563 . 140

Statutes:

Interstate Commerce Act, Sec. 15 (13) 121

Miscellaneous:

Bonbright & Means, The Holding Company (1932), pp. 11–20 35
Jones, The Trust Problem in the United States (1921), pp. 27–28 35
Seager and Gulick, Trust and Corporation Problems (1929), pp. 6–7 35
Watkins, Industrial Combinations and Public Policy (1927), p. xiv 35
17th Ann. Rep. I. C. C., Dec. 15, 1903 ..... 123, 124
18th Ann. Rep. I. C. C., Dec. 19, 1904 ..... 123, 124
19th Ann. Rep. I. C. C., Dec. 14, 1905 122
24th Ann. Rep. I. C. C., Dec. 21, 1910 107

Miscellaneous—Continued.

	Page
Ann. Reports, Attorney General:	
Dec. 10, 1909, pp. 3–4	146
Dec. 10, 1910, pp. 6–7	146
Dec. 2, 1912, pp. 23–24	146
Dec. 1, 1913, pp. 25–26	146
Dec. 7, 1914, pp. 5–7, 22–23	146
Dec. 6, 1915, pp. 7–8	146
Dec. 4, 1916, pp. 7–8	146
Dec. 4, 1917, pp. 7–8	146
Dec. 5, 1927, pp. 26–27	146
Dec. 1, 1930, pp. 26–29	146
Jan. 5, 1934, pp. 27–28	146
Jan. 5, 1935, p. 30	146
Opinions, Attorney General, Vol. 29, p. 587	146
40 Cong. Rec., Pt. 7, 59th Cong., 1st sess., pp. 6455, 6456, 6459, 6460, 6496, 6498, 6499, 6500, 6551, 6559, 6561, 6562, 6563, 6564, 6565, 6566, 6567, 6568, 6569, 6570, 7011, 7012, 7013, 7014, 7015, 7016, 7017	140–141, 143, 144
H. R. 26983, 61st Cong., 2nd sess. (45 Cong. Rec., Pt. 8, p. 8479)	145
H. R. 20470, 63rd Cong., 3rd sess. (52 Cong. Rec., Pt. 1, p. 838)	145

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois (R. 500–512) is reported in 11 F. Supp. 435.

JURISDICTION

The decree of the District Court was entered on August 28, 1935. (R. 512.) Petition for appeal was filed August 28, 1935 (R. 512) and was allowed the same day (R. 515).

Jurisdiction of this Court is conferred by the Expediting Act of February 11, 1903, c. 544, 32 Stat. 823 (U. S. C., Title 49, Sec. 45), and by Section 238

of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

This case involves the question whether the transportation in interstate commerce by appellee, a subsidiary of the United States Steel Corporation, of commodities owned by producing subsidiaries of the latter corporation (other than timber and timber products and commodities necessary and intended for use by appellee in its business as a common carrier) constitutes a violation of Section 1 (8) of the Interstate Commerce Act, commonly called the Commodities Clause. The more important issues presented are:

(1) Whether, when a holding company owns a subsidiary railroad company and also subsidiary producing companies, the railroad company has an interest within the meaning of the Commodities Clause in the commodities owned by the producing companies.

(2) Whether, if in order to establish a violation of the Commodities Clause in such a case it is necessary to show that the holding company in practice dominates, supervises, and directs the affairs of the railroad company and the producing companies as departments or branches of one industrial organization, such a showing has been made in the present case.

(3) Whether there is anything in (a) the character of the service which appellee performs for the industry with which it is affiliated or (b) the manner in which the affiliation exists, that is, by ownership of the stock of appellee, which prevents the Commodities Clause from being applicable to the transportation of the commodities in question.

STATUTE INVOLVED

The Commodities Clause reads as follows:

> From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier. (Act of June 29, 1906, c. 3591, 34 Stat. 584, 585 (U. S. C., Title 49, Sec. 1 (8)).)

STATEMENT

This is a suit in equity brought in the District Court for Northern Illinois by the United States against appellee, a common carrier railroad com-

pany, seeking to restrain as in violation of the Commodities Clause the transportation in interstate commerce of certain commodities. Appellee is a subsidiary of the United States Steel Corporation and the commodities, the transportation of which is alleged to be unlawful, are owned at the time of transportation by other subsidiaries of the United States Steel Corporation.

Appellee is a common carrier by railroad, incorporated under the laws of Illinois and Indiana, and subject to all of the provisions of the Interstate Commerce Act as amended. (R. 2, 15.) It operates a line of railroad (with branches) extending from Waukegan, Illinois, located upon Lake Michigan north of Chicago, and running southwest, then south, then southeast, and finally east to Porter, Indiana. (R. 2, 15; map, Def. Ex. 14, R. 406.) It forms what is known as the Chicago Outer Belt Line. (*Ibid.*) Its length is approximately 195 miles. (Def. Ex. 36, R. 439.) It is a most strategically located road, connecting with every railroad entering the city of Chicago. (R. 90; map, Def. Ex. 14, R. 406.) It is thus able to offer shippers along its line a choice of routes which ordinarily cannot be afforded by a single trunk line (R. 90) and, by making it possible to avoid the congested area at Chicago, to provide an expeditious means of moving freight from the east to the west and *vice versa*. (R. 105–106, 107–108, 109–110, 110–111, 113, 114, 115–116.)

Appellee is one of the subsidiaries of the United States Steel Corporation, which was formed in 1901 and which owns all of appellee's capital stock. (R. 5, 15, 104.) The United States Steel Corporation is not an operating company which produces or transports commodities in its own name, but is a holding company owning the capital stock of its various subsidiaries. (R. 41.) Appellee's road antedates the formation of the Steel Corporation by many years, its operations having commenced in 1884. (R. 104.) Its stock was owned by the general public until 1898 or 1899, when it was all acquired by the Federal Steel Company (R. 104), which became one of the Steel Corporation subsidiaries (R. 5, 15).

In 1909 appellee acquired by lease the properties of the Chicago, Lake Shore and Eastern Railway Company (hereinafter called the Lake Shore), all of whose stock was and is owned by the Illinois Steel Company, which in turn is one of the wholly owned subsidiaries of the United States Steel Corporation. (R. 4, 15; Gov. Ex. X, R. 365.) The real property thus acquired consists largely of tracks and spurs located wholly within the plants of the Illinois Steel Company. (R. 4, 15.) The main line leased from the Lake Shore is only some 16 miles in length. (Def. Ex. 36, R. 439.)

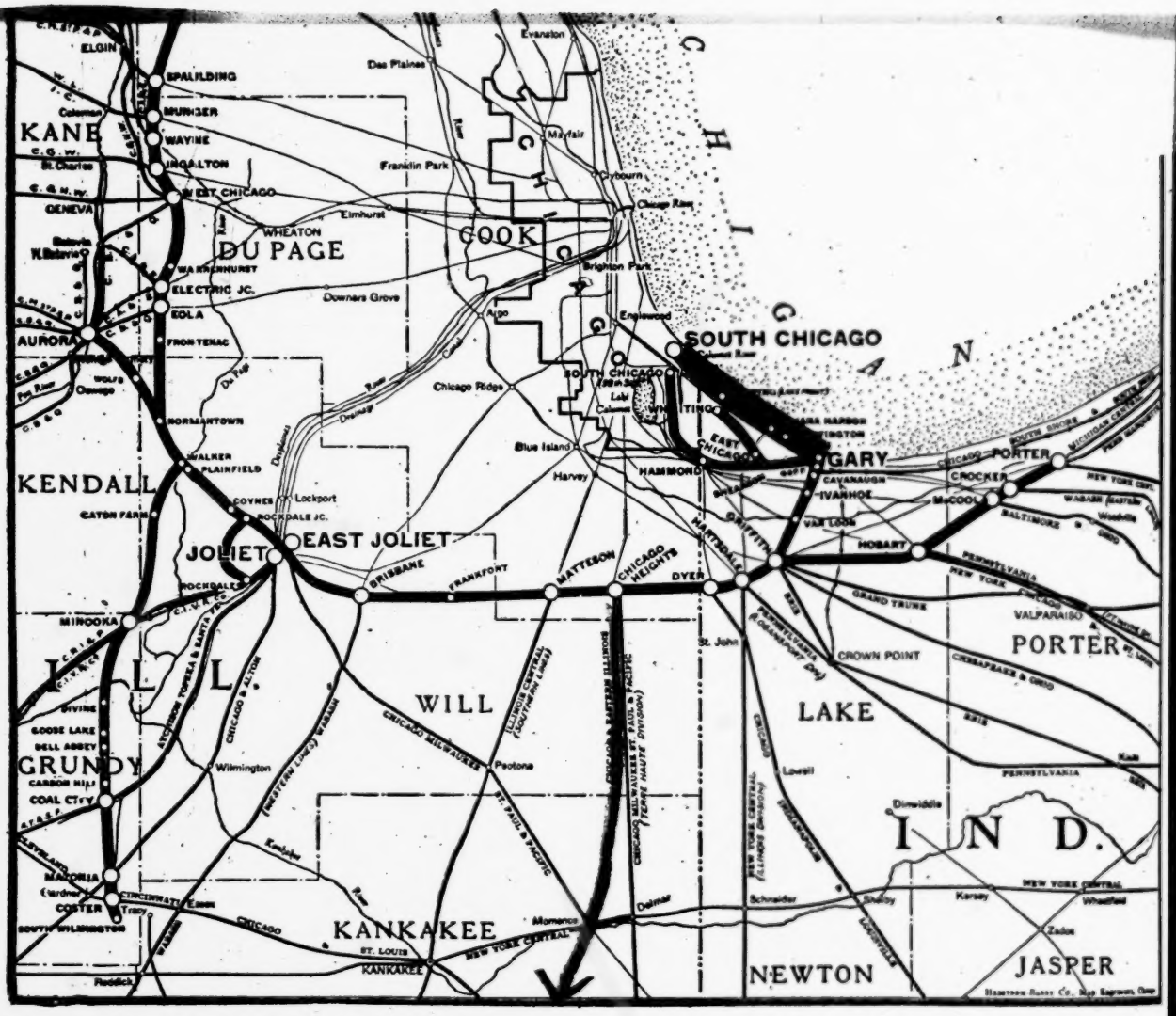
Prior to the lease of the Lake Shore in 1909, the appellee received 75% of its business from the general public, and only 25% from the Steel Corpora-

tion subsidiaries (Gov. Ex. B, R. 132, 136), and, indeed, over one-half of this 25% was business enjoyed by appellee prior to the formation of the Federal Steel Company or the United States Steel Corporation (Gov. Ex. B, R. 134). The Lake Shore, however, served "practically one industry, the Illinois Steel Company" (Gov. Ex. B, R. 135; R. 28), its haul on the larger portion of traffic received from connecting lines being only about 11 miles (Gov. Ex. B, R. 141). It had a large volume of business. (R. 29.) By virtue of the lease appellee succeeded to this traffic. Appellee's tonnage is now 60% from the United States Steel Corporation and 40% from outside sources. (R. 90.)

Under a trackage agreement dated February 1, 1909, between the Lake Shore and the Chicago & Eastern Illinois Railroad Company (hereinafter called the Chicago and Eastern) the former road enjoyed the right to haul with its trains over the line of the latter road freight from mines and quarries owned or controlled by subsidiaries of the Steel Corporation and consigned to subsidiaries of that Corporation. (R. 30–31; Gov. Ex. Y, R. 389.) Appellee acquired this trackage right upon its lease of the Lake Shore. (R. 31.) The length of the line of the Chicago and Eastern over which the trackage right is enjoyed is approximately 191 miles.[1] (Def. Ex. 36, R. 439.)

[1] The petition incorrectly described the line from Chicago Heights, Illinois to Rossville Junction, Illinois, a distance of 80 miles, as part of the line of the Lake Shore (R. 3) and

Elgin, Joliet and Eastern
Railway Company
CHICAGO
OUTER
BELT LINE
SCALE OF MILES.
0 1 2 3 4 5 6 12 18 24
W I S.
KENOSHA
LAKE
McHENRY
KANE
DU PAGE
COOK
KENDALL
GRUNDY
WILL
LAKE
PORTER
I L L.
I N D.
L A K E M I C H I G A N
WAUKEGAN
NORTH CHICAGO
LIBERTYVILLE
RONDOUT
LEITHTON
BARRINGTON
ELGIN
SPAULDING
MUNGER
WAYNE
BIGALTON
WEST CHICAGO
GENEVA
WHEATON
ELECTRIC JC.
EOLA
AURORA
NORTH AURORA
WALKER
PLAINFIELD
COYNES
Lockport
ROCKDALE JC.
JOLIET
EAST JOLIET
MINOOKA
SOUTH CHICAGO
GARY
HAMMOND
EAST CHICAGO
CAVANAUGH
IVANHOE
VAN LEAR
HOBART
CROCKER
McCOOL
PORTER
VALPARAISO
CROWN POINT
BRISBANE
FRANKFORT
MATTESON
CHICAGO HEIGHTS
DYER
GRIFFITH
HARTSDALE
Chicago Ridge
Blue Island
Harvey
Brighton Park
Englewood
Mayfair
Franklin Park
Elmhurst
Downers Grove
Lisle
Naperville
Oswego
Yorkville
Plano
Sandwich
Somonauk
Dekalb
Sycamore
Cortland
Genoa
Kingston
Hinckley
Sugar Grove
Big Rock
Millbrook
Plattville
Millington
Morris
Seneca
Marseilles
Ottawa
Utica
Peru
La Salle
Oglesby
Deer Park
Streator
Cardiff
Dwight
Odell
Pontiac
Chatsworth
Forrest
Gardner
Braidwood
Wilmington
Peotone
Monee
Manhattan
Mokena
Orland Park
Tinley Park
Oak Forest
Homewood
Flossmoor
Thornton
Lansing
Hammond
Whiting
Highland
Griffith
Schererville
Dyer
St. John
Lowell
Cedar Lake
Crown Point
Kouts
Valparaiso
Hebron
Kankakee
Momence
Wilmington
Joliet
Lockport
Plainfield
Naperville
Aurora
Elgin
Crystal Lake
Grays Lake
Libertyville
Mundelein
Lake Forest
Highwood
Waukegan
Zion
Antioch
Kenosha
Racine
Milwaukee
Chicago
Evanston
Wilmette
Winnetka
Glencoe
Northbrook
Deerfield
Des Plaines
Maywood
Melrose Park
Bellwood
Hillside
Berkeley
Elmhurst
Villa Park
Lombard
Glen Ellyn
Wheaton
Winfield
Warrenville
Batavia
St. Charles
Geneva
Sugar Grove
Aurora
Oswego
Yorkville
Plano
Sandwich
Somonauk
Dekalb
Sycamore
Cortland
Genoa
Kingston
Hinckley
Sugar Grove
Big Rock
Millbrook
Plattville
Millington
Morris
Seneca
Marseilles
Ottawa
Utica
Peru
La Salle
Oglesby
Deer Park
Streator
Cardiff
Dwight
Odell
Pontiac
Chatsworth
Forrest
Gardner
Braidwood
Wilmington
Peotone
Monee
Manhattan
Mokena
Orland Park
Tinley Park
Oak Forest
Homewood
Flossmoor
Thornton
Lansing
Hammond
Whiting
Highland
Griffith
Schererville
Dyer
St. John
Lowell
Cedar Lake
Crown Point
Kouts
Valparaiso
Hebron
Kankakee
Momence
Wilmington
Joliet
Lockport
Plainfield
Naperville
Aurora
Elgin
Crystal Lake
Grays Lake
Libertyville
Mundelein
Lake Forest
Highwood
Waukegan
Zion
Antioch
Kenosha
Racine
Milwaukee
Chicago
Evanston
Wilmette
Winnetka
Glencoe
Northbrook
Deerfield
Des Plaines
Maywood
Melrose Park
Bellwood
Hillside
Berkeley
Elmhurst
Villa Park
Lombard
Glen Ellyn
Wheaton
Winfield
Warrenville
Batavia
St. Charles
Geneva



ROUTE TRAFFIC VIA THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY AND THE FOLLOWING CONNECTIONS:

Alton Railroad	Joliet-Mazonia, Ill.
A. T. & S. F. Railway Company	Joliet-Coal City, Ill.
B. & O. Railroad	McCool, Ind.
C. & E. I. Railway Co.	Chicago Heights, Ill.
C. & N. W. Ry. Co.	Barrington-Upton-Waukegan-West Chicago, Ill.
C. & O. Ry. Co.	Griffith, Ind.
C. A. & E. R. R. Co.	Electric Jct.-Wayne, Ill.
C. B. & Q. R. R. Co.	Eola, Ill.
C. C. C. & St. L. Ry.	Hartsdale, Ind. (Via N. Y. C.)
C. G. W. R. R. Co.	Ingalton, Ill.
C. I. & L. Ry. Co.	Dyer, Ind.
C. M. & G. Ry. Co.	Aurora-Joliet, Ill.
C. M. St. P. & P.	Chicago Heights (T. H. Div.), Spaulding-Rondout, Ill.
C. N. S. & M. R. R. Co.	Rondout, Ill.
C. R. I. & P. Ry. Co.	Joliet-Minooka, Ill.
C. S. S. & S. B. R. R. Co.	Goff, Ind.
Erie R. R. Co.	Griffith, Ind.
G. T. Ry. Co.	Griffith, Ind.
I. C. R. R. Co.	Matteson-Munger, Ill.
M. C. R. R. Co.	Hartsdale, Ind.-Joliet, Ill.
M. St. P. & S. S. M. Ry. Co.	Leithton, Ill.
N. Y. C. R. R. Co.	Porter, Ind.
N. Y. C. R. R. Co. (Ill. Div.)	Hartsdale, Ind.
N. Y. C. & St. L. R. R. Co.	Hobart, Ind.
Penn. R. R. Co. (Ft. Wayne Div.)	Hobart, Ind.
Penn. R. R. Co. (Logansport Div.)	Hartsdale, Ind.
P. M. Ry. Co.	Porter, Ind.
Wabash	Brisbane, Ill.-Crocker, Ind.

For information regarding rates or routes, or location of your car, address

J. H. MANGOLD,
Traffic Manager.

J. B. DAVIES,
General Freight Agent.

W. F. HUMMEL,
Asst. General Freight Agent.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

GENERAL OFFICES, 208 South La Salle Street, CHICAGO, ILL.

There are a great many industries not in any way connected with the United States Steel Corporation located along the line of appellee. (R. 90.) It serves any shippers, including competitors of subsidiaries of the United States Steel Corporation. (R. 91.) It is party to about 2,000 tariffs as an initial or delivering line and to a great many tariffs as an intermediate line. (R. 90.) It actively solicits business on the basis of its specially strategical location. (R. 89–90.)

Appellee transports in interstate commerce a considerable volume of commodities (other than timber or timber products and commodities necessary and intended for its use as a common carrier) produced and owned by wholly owned subsidiaries of the United States Steel Corporation. (R. 4–5, 9–12, 13, 14, 15, 21–22, 81–84.) The commodities which appellee receives from the plants of various subsidiaries are destined in part to other subsidiary plants and in part to customers scattered throughout the country. (R. 81–84.)

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in the opinion below this error is repeated (R. 500–501). The evidence shows that that line is in fact part of the Chicago and Eastern over which trackage rights are enjoyed and that the main line leased from the Lake Shore (i. e., exclusive of second tracks, industrial tracks, and yard tracks and sidings) is only some 16 miles in length. (Def. Ex. 36, R. 439.)

Opposite this page is a map, furnished by counsel for appellee for use in this brief, showing in red that part of appellee's line which is leased from the Lake Shore, and showing in blue part of the line of the Chicago and Eastern over which trackage rights are enjoyed.

Appellee is a "Class I" railroad within the Interstate Commerce Commission's classification of steam railroads, which includes within that class all steam railroads whose annual railway operating revenues are regularly above $1,000,000. (Def. Ex. 41, Annual Report to Interstate Commerce Commisssion for year ending December 31, 1930, R. 125; and see Forty-Fourth Annual Report of Interstate Commerce Commission on Statistics of Railways in the United States for year ending December 31, 1930, pp. 215, 219.) Appellee's railway operating revenues in 1930, for example, were $21,807,616.06 (Def. Ex. 41), and were in excess of that amount for the years 1926, 1927, 1928, and 1929 (Def. Exs. 36, 37, 38, 39; R. 125, 429).

The petition (R. 1–14) filed originally on November 13, 1930, and as amended on February 26, 1932 (R. 1) alleged in substance that the ownership by the United States Steel Corporation of the stock of appellee and of the producing subsidiaries is employed in a manner not normal and usual with ordinary stockholders, but is so used as to dominate and control their respective affairs and to bring them under the coordinated control, management and direction of the United States Steel Corporation, and it recited divers practices and methods which among others were alleged to be means by which such control, management and direction are effectuated (R. 5–8). It alleged, further, that neither appellee nor any of such other subsidiaries is free to control and manage its own affairs in its own

interest and independently of the United States Steel Corporation; that they are in substance and reality one and the same organization consisting of many branches and departments which are managed, dominated, controlled, directed and coordinated by the United States Steel Corporation; and that the commodities in question are in fact mined, manufactured, and produced and transported by and under the same authority, namely, the United States Steel Corporation. (R. 8–9.) It alleged, finally, that by reason of the foregoing, appellee has such an interest in the commodities of the producing subsidiaries as to render their transportation in interstate commerce unlawful under the Commodities Clause, and prayed for an injunction restraining such transportation. (R. 12–13.)

The answer (R. 15–25) denied knowledge or information as to the allegations concerning the relations (other than stock ownership) between the Steel Corporation and the producing subsidiaries, and denied generally the allegations as to the relations (other than stock ownership) between the Steel Corporation and appellee, but admitted certain of the practices alleged either as set forth in the petition or as differently alleged in the answer (R. 15–21). It also alleged an affirmative defense, based apparently on the theory that appellee is an industrial railroad whose principal service is performed for the subsidiaries of the United States Steel Corporation, and that, as such, the transportation by it of the commodities of such subsidiaries

is not prohibited by the Commodities Clause. (R. 23–25.)[2]

The evidence on behalf of the United States consisted of testimony and voluminous documentary evidence relating to the following subjects, among others: interlocking directors; method of selecting appellee's directors and officers; manner in which appellee's directors function in the matter of dividend declarations and otherwise; location of appellee's general offices; employment of common counsel for appellee and other subsidiaries; meetings of the presidents of the subsidiaries; control by the United States Steel Corporation of the capital expenditures of its subsidiaries; control by the United States Steel Corporation of the surplus funds of its subsidiaries; control by the United States Steel Corporation of the clearing of inter-subsidiary transactions; participation by the subsidiaries in the United States Steel Corporation's bonus plan, pension plan and stock purchase plan; system of reports from subsidiaries maintained by the United States Steel Corporation; supervision by the United States Steel Corporation of the depositories of its subsidiaries; purchases by subsidiaries of materials and supplies from other subsidiaries; and the ne-

[2] The answer alleged as a second affirmative defense that if the Commodities Clause is construed to prohibit appellee from transporting the commodities of the producing subsidiaries it violates the due process clause of the Fifth Amendment. (R. 25.) Appellee did not urge this contention in its brief in the court below, nor was it considered by that court in its opinion. (R. 500–511.)

gotiations respecting the lease of the Lake Shore and the trackage agreement with the Chicago and Eastern.[3]

The evidence on behalf of the appellee related in part to the foregoing practices sought to be proved by the Government and in part to the following subjects, among others: volume and character of the transportation performed by appellee for the producing subsidiaries; publication and filing by appellee of tariffs covering all of its rates, and maintenance by appellee of separate accounts, in conformity with the requirements of the Interstate Commerce Act and the rules of the Interstate Commerce Commission; maintenance by appellee of its own separate operating force; testimony by shippers over appellee's line that they receive good service at fair rates and that in their dealings with appellee they do not come into contact with the officials of the United States Steel Corporation or of its producing subsidiaries; testimony by traffic officers of several connecting railroads that they receive fair treatment from appellee in the matter of divisions and that in their dealings with appellee they do not come into contact with the officials of the United States Steel Corporation or of its producing subsidiaries; and

[3] The evidence both on behalf of the Government and of appellee is considered elsewhere in the brief. (*Infra*, pp. 41–102.) The court below held against the Government on the weight of the evidence, and to avoid unnecessary repetition, a detailed discussion of the evidence is not presented in the statement.

testimony that the United States Steel Corporation or its producing subsidiaries do not issue instructions to appellee concerning the operation of its road, nor take part in the negotiation or making of divisions.

The United States requested detailed findings of fact (R. 442–480) to which appellee filed objections (R. 480–496). The United States District Court on July 1, 1935, rejected the findings requested by the United States and approved findings requested by appellee (R. 497–499), and on July 2, 1935, it filed an opinion (R. 500–511) holding that "no single piece of evidence taken alone, nor all taken together and considered as a whole warrant the inference that the defendant and the producing and manufacturing subsidiaries are under the domination, control, direction, and management of the Steel Corporation, in the sense that the defendant and the other subsidiaries are mere departments, branches, adjuncts, and instrumentalities of the Steel Corporation" and that "the evidence fails to show that the defendant has any interest, direct or indirect, legal or equitable, in the articles or commodities which it transports for the subsidiaries of the Steel Corporation" (R. 511).

The findings of fact approved by the District Court (R. 497–499) are extremely general. The court found that appellee has not transported in interstate commerce any commodity (other than timber and timber products and commodities necessary and intended for its use as a common car-

rier) which "actually, as a matter of fact, was manufactured, mined, or produced by it or under its authority or which actually, as a matter of fact, was owned in whole or in part by it or in which it actually, as a matter of fact, had an interest direct or indirect" (Fg. 1, R. 497); that appellee "conducted all of its affairs in its own name for itself and in the manner and form of a corporation" (Fg. 8, R. 498); that "neither the money, accounts, or properties" of appellee were commingled with those of the United States Steel Corporation (Fg. 12, R. 498); that "all transactions and communications" between the United States Steel Corporation and appellee were carried on "in the form of transactions and communications between two separate and distinct corporations and in such transactions and communications neither the two corporations nor their affairs were merged or mixed" (Fg. 7, R. 498); that the United States Steel Corporation whenever it desired any information concerning the affairs of, "or any other action" by, appellee "never obtained such information or took such action directly by its own officers or agents, but always made request for such information or action through the officers" of appellee "in the way which is customary and usual between corporations which are separate and distinct corporations" (Fg. 11, R. 498); that "neither the President, Secretary, Treasurer, Manager, or Superintendent" of appellee "nor any of its executive or managing operatives is an officer of or employee of the

United States Steel Corporation" (Fg. 10, R. 498); that "all communications and conferences" between the representatives of the United States Steel Corporation and of appellee respectively "whether properly characterized as orders, requests, advice, or the exercise of control" and whether originating with the Steel Corporation or with appellee related solely to appellee's "internal affairs" and "the relations" between it and the United States Steel Corporation, and did not relate to the transaction by appellee of "its transportation business" or "the relation" between appellee and "those for which it performed transportation business" (Fg. 4, R. 497); that the United States Steel Corporation did not conduct for appellee "any of its business affairs" with any other person or corporation, but appellee "conducted all of its business affairs" by its own officers and employees and not those of the United States Steel Corporation (Fg. 9, R. 498); that the United States Steel Corporation "never took any part in transporting any commodities" over appellee's road "or in operating or in managing the operation" of appellee's road or any of its operating facilities "or gave any directions or exercised any control over the transportation" conducted over appellee's road "or took any part in any of the transactions" between appellee and its shippers (Fg. 2, R. 497); that "the existence and free functioning" of appellee as a common carrier railroad corporation and a separate corporate entity was not

"destroyed or obstructed or interfered with by the United States Steel Corporation," nor was "the public recognition" of appellee as a common carrier railroad corporation "concealed, obstructed or given any particular character to distinguish it from other common carrier railroads by anything done by the United States Steel Corporation" (Fg. 3, R. 497); that appellee's "primary business" is that of a common carrier, and "its other acts and transactions were incidental to its primary business of transportation" (Fg. 2, R. 497); that appellee "regularly filed and published tariff rates covering the transportation services performed by it in accordance with the provisions of the law" and "did not discriminate against or in favor of any of its patrons either in service or in charges, but treated all alike and in accordance with its filed and published tariffs" (Fg. 5, R. 497–498); and that appellee did not exercise any authority nor contribute any property or labor in the production of the commodities transported by it, nor acquire any interest direct or indirect in any of such commodities, other than those excepted in the Commodities Clause (Fg. 6, R. 498).

From the final decree of the District Court dismissing the petition for want of equity (R. 512), this appeal was taken.

SPECIFICATION OF ERRORS

The District Court erred:

1. In entering the order and decree dismissing the petition for want of equity.

2. In holding that the evidence of record fails to establish that appellee has such interest in the commodities transported by it for the producing and manufacturing subsidiaries of the United States Steel Corporation as to make the transportation unlawful under the Commodities Clause.

3. In holding that all the evidence is insufficient to "warrant the inference that the defendant and the producing and manufacturing subsidiaries are under the domination, control, direction, and management of the Steel Corporation, in the sense that defendant and the other subsidiaries are mere departments, branches, adjuncts, and instrumentalities of the Steel Corporation."

4. In holding that "the evidence fails to show that the defendant has any interest, direct or indirect, legal or equitable, in the articles or commodities which it transports for the subsidiaries of the Steel Corporation."

5. In failing to hold and find from the evidence that appellee has such interest in the articles and commodities which it transports for the manufacturing and producing subsidiaries of the Steel Corporation as to make the transportation unlawful under the Commodities Clause.

6. In rejecting the findings of fact and conclusions of law requested by the United States, and in accepting and adopting those requested by appellee.

7. In excluding from consideration and thereby failing to give any weight or legal effect whatever to the most important and decisive basic and

fundamental facts of record concerning the relationship, business methods, and community of interest between the United States Steel Corporation, the appellee, and the manufacturing and producing subsidiaries of the Steel Corporation.

8. In failing to interpret properly and to give proper evidential weight and legal effect to such of the basic and elementary facts as were considered and recited in the opinion.

9. In admitting in evidence, and in giving weight and consideration to testimony concerning the irrelevant administrative question whether appellee discriminated against or in favor of any of its patrons either in service or in charges, and whether appellee complied with other provisions of the Interstate Commerce Act.

10. In failing and refusing to issue the injunction as prayed in the petition.

SUMMARY OF ARGUMENT

I. A railroad subsidiary of a holding company has an interest within the meaning of the Commodities Clause in commodities owned by producing subsidiaries of that holding company. The very purpose and function of a holding company, such as the United States Steel Corporation, is to control, direct, and supervise the management of its various subsidiaries. A holding company, together with its subsidiaries, constitutes one industrial organization consisting of various departments and branches, and such subsidiaries are in

fact the agents, instrumentalities, or departments of the holding company.

The Commodities Clause was designed to divorce transportation from production in order "to put an end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper." *United States* v. *Reading Co.*, 253 U. S. 26, 60–61. When appellee transports the commodities of the producing subsidiaries it plainly is in the "dual and inconsistent positions of public carrier and private shipper." *United States* v. *Del., Lack. & West. R. R.*, 238 U. S. 516, 525. Clearly, the evils sought to be reached by the Commodities Clause are no less present than if the Steel Corporation owned title directly to the railroad and producing properties: the incentive to discriminations against the shipping public is just as strong in the one case as in the other. It was on the basis of the foregoing considerations that this Court held in the *Reading* case, *supra*, that transportation by the Reading Railway Company of commodities of the Reading Coal Company, both being subsidiaries of a holding company, constituted a violation of the Commodities Clause. That case is square authority in support of the Government's contention here.

When the language of this Court's opinion in the *Reading* case, *supra*, is read in connection with the facts there presented, it would seem clear that the

decision in that case is based upon a recognition that the subsidiaries of a holding company are necessarily its mere agents, instrumentalities, or departments.

II. Notwithstanding the clear language in the *Reading* case, *supra*, the court below has held that even in the case of a holding company it is essential for the Government to establish by evidence of actual practices that the subsidiaries are administered as the agents, instrumentalities, or departments of the holding company. This is the rule which this Court has applied in the case where a railroad company owns the stock of a producing company. The court below failed to draw the clear distinction between a holding company, which is created and exists only for the purpose of directing the affairs of its subsidiaries, and an operating company which, though it may own stock in another company, is itself engaged directly in operations. In the latter case the stock may be held only for investment and "in a manner normal and usual with stockholders." *United States* v. *Reading Co., supra*, p. 63.

In any event, proof of the holding company relationship should have been held to be sufficient to establish at least *prima facie* that the subsidiaries are in fact administered as the agents, instrumentalities or departments of the United States Steel Corporation, and the court below should have approached the evidence with the view of ascertaining whether appellee has shown that the subsid-

iaries are not so administered. Appellee has clearly made no such showing in this case.

But even if the burden rested upon the Government to establish affirmatively, and without the benefit of such a presumption, that the subsidiaries are so administered in practice, the burden has been satisfied in this case by the clear weight of the evidence. The record shows a great variety of methods employed by the Steel Corporation for the purpose of administering the affairs of its subsidiaries as its mere agents, instrumentalities, or departments. It would unduly extend this Summary to attempt to summarize this evidence, and such a summary is believed to be unnecessary in view of the detailed topical headings in the index.

III. Appellee contended below that even if the subsidiaries were shown in fact to be the mere agents, instrumentalities, or departments of the Steel Corporation the transportation by appellee of commodities of the producing companies is, nevertheless, not in violation of the Commodities Clause. Appellee appeared to base its contention in part upon the claim that it is a so-called terminal or "industrial railroad." Appellee neither is nor resembles such a road. Moreover, there is no basis for the suggestion that the Commodities Clause does not apply to the transportation by such a road of commodities of an industrial corporation with which it is affiliated. Appellee also appeared to contend that a railroad subsidiary of a holding company may not, as a matter of law, be

deemed to have an interest within the Commodities Clause in commodities owned by subsidiary producing companies of that holding company. The *Reading* case, *supra*, is direct authority to the contrary.

Appellee's contention is based upon a fundamental misconception of the provisions and purposes of the Commodities Clause. The Commodities Clause expressly applies to any common carrier railroad company and to the transportation of all commodities which such railroad company owns or in which it has an interest, direct or indirect, except (1) timber and timber products, and (2) commodities necessary for common carrier purposes. The Commodities Clause, therefore, clearly applies to the transportation by appellee of all commodities (other than the excepted classes) which appellee owns or in which it has an interest direct or indirect.

The only question here is whether appellee has such an interest in the commodities owned by the producing subsidiaries. Appellee appears to contend that whether or not a railroad company has the forbidden interest in commodities owned by an affiliated producing corporation depends upon the manner or form of the affiliation. Under appellee's view if a railroad company owns the stock of a producing company, it may have an interest in the commodities of the producing company, but if the stock of a railroad company is owned by a producing company, or if the stock of both companies

is owned by a holding company the railroad company may not, under any circumstances, have an interest, direct or indirect, in such commodities.

The Commodities Clause does not prohibit ownership by a railroad company of the stock of a producing company; or ownership by a producing company of the stock of a railroad company; or ownership by a holding company of the stock of a railroad company and of a producing company; or common ownership by individuals of the stock of a railroad company and a producing company. The Commodities Clause is not a prohibition against stock ownership at all. It prohibits the transportation of commodities under certain circumstances. The effect of the decree in a suit in a Commodities Clause case is simply to enjoin the transportation of such commodities. Furthermore, the statute does not specify what constitutes an interest direct or indirect. It does not make such an interest turn upon stock-ownership. It does not mention stock or stock-ownership.

Decisions of this Court make it clear that whether a railroad has an interest direct or indirect in commodities is to be determined upon the basis of the relationship between the railroad and the owner of the commodities, considered in the light of the purpose of the Commodities Clause "to prevent railroads from occupying the dual and inconsistent positions of public carrier and private shipper" and "to separate the business of transpor-

tation from the business of selling." *United States* v. *Del., Lack. & West. R. R.*, 238 U. S. 516, 525.

There is plainly no basis for the suggestion that whether the Commodities Clause is being violated depends upon such a formal matter as the manner of affiliation between the railroad company and the producing company; or that the broad policy of the Commodities Clause may be frustrated by a mere rearrangement in the formal corporate relationships between the railroad company and the producing company; or that the Commodities Clause may be so construed as either to exempt certain common carrier railroads or as to exempt certain classes of commodities in addition to those specifically excepted by Congress from the operation of the Clause.

ARGUMENT

I

APPELLEE'S INTEREST WITHIN THE MEANING OF THE COMMODITIES CLAUSE IN THE COMMODITIES OWNED BY THE PRODUCING COMPANIES IS ESTABLISHED BY REASON OF THE COMBINATION IN THE UNITED STATES STEEL CORPORATION, A HOLDING COMPANY, OF ALL OF THE STOCK OF APPELLEE AND OF THE PRODUCING COMPANIES.

The court below has held (1) that even where a holding company owns all of the stock of a subsidiary railroad and all of the stock of other subsidiaries producing commodities which such railroad transports, the subsidiary railroad does not have an interest in such commodities within the meaning of

the Commodities Clause unless it is shown that in actual practice the holding company so supervises and directs the affairs of the subsidiary railroad and producing companies as to make them its mere departments and instrumentalities (R. 507); and (2) that the evidence in this case fails to establish such supervision and direction on the part of the United States Steel Corporation, the holding company (R. 511).

The Government contends that the court below erred in both aspects of its decision. Under Point II of the brief the evidence of record respecting the practices of the United States Steel Corporation in its dealings with its subsidiaries is considered in detail. It is the Government's contention that the weight of this evidence clearly establishes that the United States Steel Corporation in fact does actively supervise and direct the affairs of its subsidiaries, including appellee, and that in practice the United States Steel Corporation exercises the power of control, vested in it by its ownership of the stock of its subsidiaries, to manage and direct their affairs as departments and branches of one industrial organization.

In the Government's view, however, proof that the power of control is in fact so exercised is not essential in this case. It is the Government's contention that appellee's interest within the meaning of the Commodities Clause in the commodities in question is established by virtue of the admitted

fact that the United States Steel Corporation is a holding company owning all of the stock of appellee and of the producing subsidiaries. And the Government submits that this contention has the support both of the decision of this Court in *United States* v. *Reading Co.*, 253 U. S. 26, and of the reasoning upon which it is based.

In the *Reading* case the distinction between the case of a holding company and one in which, as in the earlier Commodities Clause cases, a railroad company owned stock in a producing company is made clear, for in that case both situations were presented. The Reading Company, a holding company, owned the stock of the Reading Railway Company and of the Reading Coal Company. The Central Railroad Company owned the stock of a coal company. The case presented the question whether the Reading Railway Company violated the Commodities Clause in transporting the commodities of the Reading Coal Company, and it also presented the different question whether the Central Railroad Company violated the Commodities Clause in transporting the commodities of the coal company in which it held stock. The Court dealt with each of these questions separately: The Reading Railway Company at 253 U. S. 26, 60–62, and the Central Railroad Company at 253 U. S. 26, 62–63. The court below in its opinion has confused these two separate holdings by the Court in the *Reading* case and has quoted (R. 507–508) as the

law applicable to a holding company the language in the *Reading* case dealing with the Central Railroad, despite the Court's express statement (253 U. S. 26, 60) in its discussion of the Reading Railway Company that the decision in the earlier Commodities Clause cases (*United States* v. *Delaware & Hudson Co.*, 213 U. S. 366), which involved ownership by a railroad of stock in a producing company, was not applicable to the case of a holding company.

The lower court in the *Reading* case had applied the decision of this Court in *United States* v. *Delaware & Hudson Co., supra,* respecting ownership by a railroad company of stock in a producing company, to the Reading Railway Company and had held that it did not violate the Commodities Clause in transporting the commodities of the Reading Coal Company. It had pointed out that neither corporation "has any title or interest, legal or equitable, in the real and personal property owned by the other"; that "this separation in legal contemplation is reinforced by a separation of corporate activity"; that "each keeps to its own affairs and does not meddle with the business of the other"; that the "Railway deals with the Coal & Iron Company at arm's length, as with other persons, making and carrying out contracts in the same way"; that the "Coal & Iron Company pays the regular tariff rates on all its coal transported by the Railway"; that "the Railway has not discriminated in favor of the Coal & Iron Company,

either in the distribution of cars or in the use of other facilities of transportation"; that "the operative management of the two corporations is distinct"; that the Coal Company "keeps its own separate books and its separate bank account"; that while the corporations have common directors and certain common officers, "the executive departments of the two companies are distinct in important particulars";[4] and that "the assets of the Coal & Iron Company are distinct from the assets of the Railway Company." (226 Fed. 229, 279–280.)

This Court in the *Reading* case characterized the decision of the lower court and pointed out its fundamental error in the following language (p. 60):

> The Circuit Judges centering their attention upon the fact that the Reading Railway Company did not own any of the stock of the Reading Coal Company; that the two companies had separate forces of operatives and separate accounting systems; and upon the importance of maintaining "the theory of separate corporate entity" as a legal doctrine, concluded, upon the authority of *United States* v. *Delaware & Hudson Co.*,

[4] The court pointed out that the Coal Company had its own general sales agent; that the general freight traffic manager of the Railway, one of its vice-presidents, was in no way connected with the Coal Company, and that this was also true of the general manager of the Railway, one of its vice-presidents, of the Railway's comptroller, and since 1914, of the Railway's president. (226 Fed. 229, 278, 280.)

213 U. S. 366, 413, that the evidence did not justify holding that in transporting the products of the Reading Coal Company's mines to market the Reading Railway Company was carrying a commodity "mined, or produced by it, or under its authority" or which it owned "in whole, or in part," or in which it had "any interest direct or indirect."

But the question which we have presented by this branch of the case is not the technical one of whether ownership by a railroad company of stock in a coal company renders it unlawful for the former to carry the product of the latter, for here the railroad company did not own any of the stock of the coal company. *The real question is whether combining in a single corporation the ownership of all of the stock of a carrier and of all of the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act.* [Italics supplied.]

The issue which in the above language the Court described as the "real question" involved and which the Court stated was different from that presented in *United States* v. *Delaware & Hudson Co.*, *supra*, and therefore not controlled by the decision in that case, is the precise issue which the instant case presents. The affirmative answer given in the *Reading* case is controlling here.

The decision in the *Reading* case was based both upon the purpose of the Commodities Clause and upon a realistic recognition of the functions and activities of a holding company. The Court pointed out the obvious fact that the evil sought to be reached by the Commodities Clause is equally present whether the title to both the railroad and the producing properties is held in one corporation or whether such title is held by subsidiary corporations whose stock is combined through the medium of a holding company. The Court stated (pp. 60–61):

> The purpose of the commodity clause was to put an end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper. Plainly in such a case as we have here this evil would be present as fully as if the title to both the coal lands and the railroads were in the Holding Company, for all of the profits realized from the operations of the two must find their way ultimately into its treasury,—any discriminating practice which would harm the general shipper would profit the Holding Company. *Being thus clearly within the evil to be remedied, there remains the question whether such a controlling stock ownership in a corporation is fairly within the scope of the language of the statute.* [Italics supplied.]

After referring to the provisions of the Commodities Clause, the Court stated (pp. 61–62):

> Accepting the risk of obscuring the obvious by discussing it, and without splitting hairs as to where the naked legal title to the coal would be when in transit, we may be sure that it was mined and produced under the same "authority" that transported it over the railroad. All three of the Reading companies had the same officers and directors and it was under their authority that the mines were worked and the railroad operated, and they exercised that authority in the one case in precisely the same character as in the other—as officials of the Holding Company. *The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action by both the Railway Company and the Coal Company, involving as it did the surrender to the Holding Company of the entire conduct of their affairs. It would be to subordinate reality to legal form to hold that the coal mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same "authority" that operated the Reading Railway lines.* [Italics supplied.]

It seems clear that this Court's decision that the Reading Railway Company violated the Commodities Clause was based upon "the manner in which the stock" was held, that is, in a holding company,

which the Court said involved "the surrender to the Holding Company of the entire conduct" of the affairs of the subsidiary companies. The Court expressly stated that the question presented for decision was whether such a combination through *stock ownership* or "such a controlling *stock ownership*" is within the scope of the Commodities Clause. Apart from the maintenance of "separate forces of operatives and separate accounting systems", the only fact which the Court in its discussion of the Commodities Clause mentioned respecting the actual practice in the administration of the affairs of the subsidiaries, was the interlocking of directors and officers. The suggestion that the decision of the Court may have turned upon this fact does violence to the Court's discussion as a whole of this subject, to its statement of the question which was presented for decision and to its refusal to permit the realities of the relationship to be obscured by technicalities. It would be strange indeed if the question as to whether the Commodities Clause is violated should be made to depend upon whether or not the officers and directors of the holding company are permitted to serve also for the subsidiaries.[5]

[5] That the Court did not intend to adopt any such rule is made clear by its opinion with respect to the Central Railroad Company, which, as previously stated, owned the stock of a producing company. In such a case it had been held in prior decisions that it is essential for the Government to prove that in actual practice the producing company is ad-

The court below sought to distinguish the *Reading* case on still other grounds. It referred to the fact that the holding company in that case held title to the engines, cars and other equipment, so that the railroad was disabled from performing its functions as a carrier except with the aid of the holding company, and to the further fact that the Coal Company joined with the holding company in

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ministered as an agent or department of the railroad company. The Court in the *Reading* case applied those prior decisions to the Central Railroad Company, stating (pp. 62–63):

"* * * It results that it may confidently be stated that the law upon this subject now is, that while the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require."

The foregoing is the language which the court below quoted (R. 507–508) as stating the law applicable to a holding company. If the court below was correct in applying the same rule to both situations, and if this Court's ruling as to the Reading Railway Company is interpreted to turn upon the fact that there were interlocking directors and officers, it would necessarily follow that in the case of a railroad owning stock of a producing company the issue as to whether the Commodities Clause was being violated would also turn upon whether there were interlocking directors and officers.

a mortgage of their properties (R. 505–506).[6] This Court mentioned neither of these facts in its discussion of the Commodities Clause. If, as the court below has interpreted the decision in the *Reading* case, it is based not upon the power of control existing in the holding company, but upon the administration *in practice* of the affairs of the subsidiary companies as different departments of one industrial organization, these facts are obviously without relevancy. It is to be noted that the holding company, though it owned the equipment, leased it to the Reading Railway Company. (226 Fed. 229, 275, 278.) So far as concerns the power of control, that power was completely vested in the holding company by its ownership of the stock—and here it is just as complete in the United States Steel Corporation. Furthermore, when the Court in the *Reading* case stated (and the court below relied

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If this Court had intended to hold to that effect, it would clearly have so stated in its discussion of the Central Railroad Company. Instead, it stated the law as to ownership by a railroad of stock in a producing company in substantially the same language as had been used in the earlier cases. And see *United States* v. *Del., Lack. & West. R. R.*, 238 U. S. 516, 536:

"* * * It should not sell to a corporation with officers and offices in common,—for the policy of the statute requires that instead of being managed by the same officers, *they should studiously and in good faith avoid anything, either in contract or conduct, that remotely savors of joint action, joint interest or the dominance of one Company by the other.*" [Italics supplied.]

[6] The court below mistakenly states that the railroad joined in this mortgage. (R. 506.)

also on this language) that the "Holding Company had continued in active, dominating control of the Reading Railway Company and of the competing Central Railroad system, and also of the two coal companies, thus effectually suppressing all competition between the four companies and pooling their earnings" (p. 59), the Court was manifestly referring to the power of control and not to the manner in which the affairs of the subsidiary companies were in practice administered. The Court used the language last quoted in its consideration of the antitrust aspect of the case. In antitrust cases it is sufficient for the Government to establish power of control in the combination to suppress competition between the constituent companies, and such cases do not turn upon whether in practice the affairs of the constituent companies are administered as departments or branches of the combination. That the Court in dealing with the Reading Railway Company was not concerned with the question whether there was in practice an actual administration of the affairs of the constituent companies as departments or branches of the holding company is shown by the fact that immediately following its description of the creation of the holding company and before considering any subsequent facts, the Court characterized the effect of the reorganization under which the holding company was created, as follows (p. 48):

> Obviously, also, it made the Coal Company and the Railway Company mere agents or

> instrumentalities of the Holding Company—the mining and transportation departments of its business—for producing, purchasing, and selling coal and for transporting it to market. The Reading *Railway* Company and the Reading Coal Company each had thereafter but one stockholder,—the Holding Company—and their earnings were to be distributed not in proportion to the shares of their capital stocks, aggregating $28,000,000, but were to go to the creditors and shareholders of the Holding Company, with its mortgage debt of $135,000,000 and its capital stock of $140,000,000. The Holding Company thus served to pool the property, the activities and the profits of the three companies. *Northern Securities Co.* v. *United States,* 193 U. S. 197, 327, 362.

The decision of this Court as to the Reading Railway Company was based, we submit, upon a recognition of the realities of the relationship between a holding company and its subsidiaries and upon the character and functions of a holding company. The power of control is "inherent in that form of organization". See *United States* v. *Reading Co., supra,* p. 57; Watkins, Industrial Combinations and Public Policy (1927), p. xiv; Jones, The Trust Problem in the United States (1921), pp. 27–28; Seager and Gulick, Trust and Corporation Problems (1929), pp. 6–7; Bonbright & Means, The Holding Company (1932), pp. 11–20. It involves "the surrender to the Holding Company of the entire conduct of [the] affairs" of the sub-

sidiaries, and their "abdication of all independent corporate action". *United States* v. *Reading Co., supra,* pp. 62–63. Unlike an operating company, which though it owns stock in another company, is itself engaged in operations and may incidentally own such stock for investment and "in a manner normal and usual with stockholders" (*United States* v. *Reading Co., supra,* p. 63), a holding company is created and exists for the very purpose of exercising control over its subsidiaries, while permitting them "to retain the semblance of independent existence" (Seager and Gulick, *supra,* pp. 6–7). In cases under the anti-trust laws this Court has given practical recognition to the character and functions of holding companies. See *Northern Securities Co.* v. *United States,* 193 U. S. 197, 326–327; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 75; *United States* v. *U. S. Steel Corp.,* 251 U. S. 417.[7] It is submitted that this same practical rec-

[7] In the *Northern Securities* case, *supra,* this Court stated (pp. 326–327):

"* * * The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership.* Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent com-

ognition, in the light of the purposes of the Commodities Clause, is also the basis of this Court's decision in the *Reading* case in applying that statute to the Reading Railway Company, and that the decision in that case and the reasoning upon which it is based are directly applicable here.

It would seem plain that the testimony given on behalf of appellee by shippers over its line and by the traffic officers of connecting railroads that they receive fair treatment in their dealings with appellee in the matter of rates and service [8] was im-

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panies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interest, but upon the basis of the certificates of stock issued by the holding company."

[8] It is to be noted that it is at least doubtful whether the court below was justified on the basis of such testimony in finding affirmatively that appellee "did not discriminate

material, as was also proof that appellee regularly files and publishes tariff rates and keeps its accounts in conformity with statutes and regulations applicable to railroad common carriers. The Commodities Clause is designed to "cure or prevent the evils that might result" if the railroad "occupied the dual and inconsistent position of public carrier and private shipper" and "the courts are not concerned with the question as to whether, in a particular case, there had been any discrimination against shippers or harm to other dealers. The statute is general and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented". *Del., Lack. & West. R. R.* v. *United States,* 231 U. S. 363, 370. Clearly also, a carrier cannot obtain immunity from the Commodities Clause because it claims to have conducted its

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against or in favor of any of its patrons either in service or in charges" (Fg. 7, R. 497–498). Such testimony does not prove that appellee practices no discrimination whatever; it proves only that the particular shippers and traffic officers who testified had no complaint to offer. Moreover, the question whether appellee practices discrimination between shippers is an administrative question entrusted, as respects interstate commerce, exclusively to the Interstate Commerce Commission. See *Florida* v. *United States,* 282 U. S. 194, 215; *Texas & P. R. Co.* v. *Abilene Cotton Oil Co,* 204 U. S. 426; *Virginian Railway* v. *United States,* 272 U. S. 658, 665–666.

business in conformity with other statutes, such as those regulating the filing of tariffs and the keeping of accounts.

II

THE WEIGHT OF THE EVIDENCE ESTABLISHES THAT THE UNITED STATES STEEL CORPORATION IN PRACTICE ACTIVELY EXERCISES THE POWER OF CONTROL VESTED IN IT BY ITS OWNERSHIP OF THE STOCK OF APPELLEE AND OF THE PRODUCING SUBSIDIARIES TO MANAGE AND TO DIRECT THEIR AFFAIRS AS DEPARTMENTS AND BRANCHES OF ONE INDUSTRIAL ORGANIZATION

As previously stated, the court below has held, contrary to what would seem to be the clear import of the decision of this Court in the *Reading* case, *supra,* that proof of the ownership by a holding company of the stock of a subsidiary railroad and of subsidiary producing companies is not sufficient to establish an interest on the part of the railroad within the Commodities Clause in the commodities of the producing companies. Instead, the court below has applied here the rule applicable to the case where a railroad owns stock in a producing company. This rule, as restated in the *Reading* case by this Court in its discussion of the Central Railroad Company, is as follows (pp. 62–63):

> It results that it may confidently be stated that the law upon this subject now is, that while the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the railroad company to

> transport in interstate commerce the products of such mining company, yet where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require.

Even if it be assumed that the foregoing states the law applicable to the present case and that consequently the Government must establish that the ownership of the stock is used by the holding company for the purpose of making the subsidiaries its agents, instrumentalities or departments, it does not follow that the burden of proof resting upon the Government to establish that fact is the same here as in the case where a railroad owns the stock of a producing company. Considering that the very purpose of combining various subsidiaries in a holding company is to create a unified control over their affairs, considering the completeness of the power thus vested in the holding company, and considering that in practice such power must inevitably be exercised, it would seem that proof of the existence of a holding company should be sufficient to establish at least *prima facie* that the

stock ownership is in practice resorted to by the holding company for the purpose of making the subsidiaries its "mere agents or instrumentalities" (*United States* v. *Reading Co., supra,* p. 48). This much at least would seem to be the necessary effect of the Court's holding in the *Reading* case. We submit, therefore, that the burden was upon appellee to establish that in the conduct of its affairs it is not subject to the influence or domination of the Steel Corporation. (Compare *United States* v. *Del., Lack. & West. R. R.,* 238 U. S. 516, 536.) That such a showing has not been made by appellee will clearly appear from a consideration of the evidence.

But even if the burden rested upon the Government to establish affirmatively, and without the benefit of such a presumption, that in practice the Steel Corporation dominates and controls the affairs of appellee and of the producing subsidiaries so as to constitute them agencies or departments of one industrial organization, the Government submits that such a showing has been made in this case by the clear weight of the evidence.

1. Introductory

It is believed that it will be of material assistance to the Court in its examination of the evidence and will aid in simplifying and bringing more clearly into focus the issues of the fact presented, if before the evidence is analyzed in detail, consideration is

given briefly to certain aspects of the decision below and to certain of appellee's contentions.

It is apparent both from the findings and the opinion* of the court below that the feature of the evidence which most impressed the court was the fact that the transactions and communications between appellee and the Steel Corporation were carried on "in the form of transactions and communications" between separate corporations. This thought appears in Findings 7, 8, 9 and 11. (R. 498, 509.) Thus the court finds that:

> Defendant conducted all of its affairs in its own name for itself and in the manner and form of a corporation. (Fg. 8, R. 498, 509.)
>
> Whenever any information concerning the affairs of defendant or any other action by defendant was desired by United States Steel Corporation, the United States Steel Corporation never obtained such information or took such action directly by its own officers or agents, but always made request for such information or action through the officers of defendant, in the way which is customary and usual between corporations which are separate and distinct corporations. (Fg. 11, R. 498, 509.)

In the same general category is the finding that "the moneys, accounts, and properties of each com-

*The findings are repeated verbatim in the opinion (R. 508–510).

pany were kept separate and distinct from the moneys, accounts, and properties of the other and the identity and integrity of the moneys, accounts and properties of each company were preserved without any mixture, commingling, or confusion." (Fg. 12, R. 498, 509–510.) Of course, appellee is in form a separate corporation and has its own books of account, its own properties and its own operating force. But the issue of fact under the Commodities Clause is plainly not one of form, but of substance. These findings by the court below are strikingly like those of the lower court in the *Reading* case. (*Supra,* pp. 26–27.) This Court in reversing that decision gave no weight to such considerations. (*Supra,* pp. 27–31.)

One other point is much stressed by the court below. This is the attempted distinction, in appellee's relations with the United States Steel Corporation, between the so-called "internal affairs" of appellee and its functions as a common carrier. (See Fgs. 2, 3, 4, R. 497, and the Opinion, R. 510, 511.) Thus the court finds:

> The primary business of defendant is that of a common carrier. Its other acts and transactions were incidental to its primary business of transportation. The United States Steel Corporation never took any part in transporting any commodities over the railroad of the defendant or in operating or in managing the operation of de-

> fendant's railroad or of any of the facilities of such operations or gave any directions or exercised any control over the transportation conducted over the railroad of defendant or took any part in any of the transactions between the defendant and the shippers over its railroad. (Fg. 2, R. 497, 508.)
>
> All communications and conferences between representatives of the United States Steel Corporation and representatives of defendant whether properly characterized as orders, requests, advice, or the exercise of control, and whether originating with the United States Steel Corporation or with defendant, related solely to the internal affairs of the defendant and to the relations between United States Steel Corporation and defendant, and did not relate to the transaction by defendant of its transportation business or the relation between the defendant and those for which it performed transportation business. (Fg. 4, R. 497, 508–509.)

It is difficult to understand precisely what the court means by "internal affairs." If the court has in mind that appellee runs its trains and enters into negotiations with shippers through its own staff of operatives, this point is also disposed of by this Court's decision in the *Reading* case where it similarly appeared that the Reading Railway had its own separate force of operatives. (*Supra*, pp. 26–27.) If by "internal affairs" the court has

reference to matters which normally arise between a corporation and its stockholders, the evidence, as will be seen, definitely precludes the possibility of applying any such distinction to the present case. To mention some items: the Steel Corporation decides, except in the case of negligible expenditures, whether appellee shall make improvements to its road (*infra,* pp. 60–64); it draws into its control appellee's surplus funds (*infra,* pp. 65–68); it decided whether appellee should lease the Chicago Lake Shore and Eastern Railway Company (*infra,* pp. 85–94); it participated in the negotiations respecting the agreement for trackage rights over the line of the Chicago and Eastern Illinois Railroad Company (*infra,* pp. 79–84). Clearly these matters have directly to do with the appellee's common carrier functions. And in the case of the lease and trackage agreement, the interest of the United States Steel Corporation and of its subsidiaries, as shippers, is found to be the dominant factor governing the decision as to these important railroad policies, in direct contravention of the purpose of the Commodities Clause. (*Infra,* pp. 79–100.) These are matters not even discussed either in the findings or opinion of the court below.

While appellee also relied principally upon the foregoing considerations stressed by the court below, appellee in addition made certain related, subsidiary contentions which it would be of advantage to consider here. With respect to some of the prac-

tices relied upon by the Government appellee urged that its participation was voluntary. Of course, where a holding company has control over subsidiaries it would be expected that the subsidiaries would voluntarily submit to its desires, and indeed, the greater the extent of control, the more compliant would be the acquiescence. In the Government's view, the issue of fact in this case cannot turn upon such a subjective matter as the asserted state of mind of appellee's officers. The issue is to be decided upon an objective consideration of what in practice was done as between the Steel Corporation and its subsidiaries. Only upon the basis of such a consideration can it be safely determined whether in practice the subsidiaries are subject, whether voluntarily or not, to the actual exercise by the Steel Corporation of its power of control.

Somewhat similar in character was appellee's reliance upon the fact that in the communications from the Steel Corporation to appellee, the language sometimes used was that of a "request" or a "recommendation." That the use of such expressions cannot safely be relied upon is apparent. It is by usage customary for a superior to address his subordinate in some such polite language, and indeed a subordinate may frequently be asked whether he is in accord with a proposal made by his superior. The subordinate is none the less such because he is so addressed. The only pertinent inquiries are whether the Steel Corporation ex-

pects its wishes to be complied with, and whether if the appellee desires to do something different it must first persuade the Steel Corporation officers to change their mind. Manifestly, the answer to these questions cannot turn upon the form of language used, but rather, again, upon an objective consideration of what in practice was done.

As to some practices appellee pressed still another point. It was urged that some of the practices were in the interest of efficiency or economy. This contention amounts to no more than this: that the Steel Corporation having acquired control over its subsidiaries naturally found it to advantage to exercise that power of control. Appellee might have gone still further and urged that it was of advantage to the Steel Corporation to have as part of its organization the control of transportation facilities. These matters are beside the point. The Commodities Clause enacts a specific policy as part of the legislative system for regulating the railroads. The supposed advantages to be derived from a frustration of that policy can be of no avail to appellee.

One further matter requires brief mention. Appellee made the point, as to one or two practices, that the evidence related to appellee exclusively, as distinguished from the other subsidiaries. Presumably the thought was that in such instances the evidence had no bearing upon the extent of domination or control practiced as to the producing sub-

sidiaries.[10] As will appear, most of the evidence was not so restricted. Furthermore, any doubt on this score is set at rest by the testimony of Mr. Filbert, who was Assistant Comptroller of the Steel Corporation at the time of its formation in 1901, became its Comptroller in 1902, continuing as such until 1932, when he became Vice Chairman of its Finance Committee, and is now Chairman of the Finance Committee. (R. 48.) Mr. Filbert testified: "In the case of the manufacturing and raw material subsidiary companies, the Corporation exercised a much wider supervision and interest in the affairs or conduct of the affairs of those companies than it does in the case of railways." (R. 63.) Mr. Filbert stated that he has been "in close and intimate contact with the business affairs of the United States Steel Corporation during the period of time since its organization", and that "there is no one in the Steel Corporation now, no officer of the Steel Corporation now, who has intimate knowledge, as intimate knowledge for that period of time, as I have, since the retirement of Judge Gary and Mr. Farrell." (R. 58–59.) If, then, the Steel Corporation has been shown to supervise and direct the affairs of appellee as its

[10] It is to be noted in passing that any such contention on the part of appellee is inconsistent with the stand taken at the trial by appellee's counsel that the only relevant evidence was as to the relations between the appellee and the Steel Corporation. (R. 55.)

agent or instrumentality, such a showing has *a fortiori* been made as to the producing subsidiaries.

To summarize: The single issue of fact presented here, in the Government's view, is whether upon an objective consideration of the actual practices shown by the evidence, the inference is compelled that the Steel Corporation uses its ownership of stock for the purpose of making appellee and the producing subsidiaries its agents or instrumentalities or departments. *United States* v. *Reading Co.*, *supra*, pp. 62–63. Much of the evidence is in documentary form and can, therefore, fairly be considered as not in substantial dispute. In view, however, of the failure of the court below to make specific findings of fact, the Government has been compelled to present the evidence in fuller detail than would otherwise have been necessary. But even a full summary of the evidence, unless of inordinate length, cannot convey to the Court an adequate impression of the extent to which in the daily life of appellee the controlling arm of the Steel Corporation operates to direct its affairs. Such an impression can be obtained only by a reading of the voluminous correspondence in the record.

The Government does not rely on any single fact considered alone. Manifestly each fact must be weighed in the light of all other facts. If in the subsequent summary of the evidence, some subjects are treated more at length than others, this is not necessarily because such other facts are considered

of lesser significance, but rather because certain matters, being proved primarily by documentary evidence, require a more lengthy treatment.

2. Management, offices and counsel

Formation of the Steel Corporation.—The United States Steel Corporation was organized in 1901. (R. 104.) By November 11, 1901 its list of subsidiaries included 55 corporations. (Gov. Ex. E, R. 230–231.) Appellee was among its earliest subsidiaries, as were several of the producing subsidiaries mentioned in the petition. (*Ibid.*)

The Steel Corporation is not an operating company which produces or transports commodities in its own name, but is a holding company owning the capital stock of its various subsidiaries. (R. 41.) That its intended function is to coordinate the affairs of its various subsidiaries for the advantage of the Steel Corporation is obvious. Explicit recognition of this fact is contained in its by-laws which provide (Gov. Ex. M, R. 329):

> Powers and Duties of the President: In the absence of the Chairman of the Board and the Chairman of the Finance Committee, the President shall preside at all meetings of the stockholders and of the Board of Directors. Subject to the Board of Directors and the Finance Committee, he shall have general charge of the *business of the corporation relating to manufacturing, mining, and transportation and general operation.* [Italics supplied.]

It will be observed that some of the important practices referred to herein commenced very early in the life of the Steel Corporation. The clearance account (*infra*, p. 68), by which the Steel Corporation controls the clearing of intersubsidiary transactions dates from 1901. (Gov. Ex. E, R. 230.) The advance account (*infra*, p. 65), by means of which the Steel Corporation draws into its control the surplus funds of appellee was in existence by 1905. (Gov. Ex. E, R. 234.) The practice of exercising control over the capital expenditures of the subsidiaries (*infra*, p. 60) was in full swing by the close of 1907, and had apparently existed in some form during the preceding six years. (Gov. Ex. K, R. 292.) Although other practices began at a later date, it is apparent that almost immediately upon its formation the Steel Corporation acted swiftly to coordinate under its unified control the affairs of its subsidiaries.

Interlocking directors, 1901 to 1920.—Specifically as to appellee, this is shown by the immediate placement on its board of directors of important officials of the Steel Corporation. At the time of the formation of the Steel Corporation, Judge Gary, chairman of its board of directors, and Mr. Shearson, its Comptroller, were on the board of directors of appellee. (Gov. Ex. R, R. 354; R. 32–33, 47, 77.) During 1901 three more directors or officers of the Steel Corporation came on the board of directors of appellee, including Mr. Charles M.

Schwab, president of the Steel Corporation. (Gov. Ex. R, R. 354; Gov. Ex. D, R. 180; R. 77.) Thus within the first year of the formation of the Steel Corporation, five of appellee's directors were officers or directors of the Steel Corporation, and they included three of the most important officials of the Steel Corporation: Judge Gary, Mr. Shearson and Mr. Schwab. Furthermore, Judge Gary was continuously a director of appellee until 1920. (Gov. Ex. R, R. 354; R. 47, 77.) Mr. Trimble, secretary and treasurer of the Steel Corporation was a director of appellee from 1904 to 1920. (*Ibid.*) Mr. Filbert, Comptroller of the Steel Corporation, was a director of appellee from 1905 to 1920. (*Ibid.*) Mr. Farrell, president of the Steel Corporation, was a director of appellee from 1911 to 1920. (*Ibid.*) There were other interlocking directors. (*Ibid.*) The matter may be summed up as follows: at no time from 1901 to 1920 were there on the appellee's board of directors less than four officers or directors of the Steel Corporation, and as indicated, these included the most important officials of the Steel Corporation. (*Ibid.*)

Method of selecting appellee's officers and directors.—Although in 1920 these four officials of the Steel Corporation retired from appellee's board of directors, an equally effective device for continuing in the Steel Corporation the control of appellee's management is secured through the method by which appellee's officers and directors

are selected. At the annual meeting of the stockholders of appellee, appellee's president votes all of its stock under a proxy from the Steel Corporation. (R. 47, 30.) The president selects appellee's directors and recommends them to the stockholders (R. 42), but as the president represents all of the stock, he is, of course, merely making a recommendation to himself. Then, the directors meet to elect the officers, and the president names the officers for the directors to vote upon. (R. 42.) Mr. Banks, president of appellee from 1901 to 1931 (R. 26), testified that the directors in electing officers followed his recommendations without exception. (R. 42.) With some minor exceptions, the directors thus chosen have been selected from the officials or employees of appellee, and at the present time only its officials or employees serve as directors. (R. 47.) It is obvious that such a method of electing directors and officers draws all power into the hands of the president and reduces the directors and other officers merely to a title. It cannot be expected that officers and directors selected in that manner from the payroll employees and officials of appellee would find it possible to exercise any independent discretion. No other fact could illustrate more clearly the exceptionally dominant position occupied by appellee's president in relation to appellee's management. Appellee's president is its management. Under such circumstances all that the Steel Corporation needs in

order to supervise and direct the affairs of appellee, is a president obedient to the wishes of the Steel Corporation. Such a president is really nothing more than the Steel Corporation's agent, running one department of the Steel Corporation's business. The many letters between the Steel Corporation's officials and appellee's president must be read in the light of the foregoing considerations.

Declaration of dividends.—In the matter of dividend declarations is found one illustration of a president obedient to the wishes of the Steel Corporation and of a board of directors which might just as well be non-existent. The correspondence speaks for itself. (Gov. Ex. F, R. 261–274; Gov. Ex. E, R. 236, 237–238.) On December 1, 1922 Mr. Banks, appellee's president, wrote to Mr. Filbert, Comptroller of the Steel Corporation (Gov. Ex. F, R. 262):[11]

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[11] See similar letter of June 5, 1922 from Mr. Banks, who was also president of the Lake Shore Road, to Mr. Filbert:

"It has been customary for us to declare an extra dividend of five percent on our C., L. S. & E. Stock at our June meeting and I presume that it will be the wish of Judge Gary that we declare a dividend this year.

"Will you kindly advise so that we can prepare our minutes and arrange to declare such dividend?" (Gov. Ex. F, R. 261–262.)

See also Gov. Ex. E, R. 236, 237–238.

On June 15, 1923, Mr. Filbert wrote to Mr. Banks that "in reviewing with Judge Gary this morning the matter of dividends which we have to suggest that subsidiary companies declare in the month of June, he approved" certain recommendations made by Mr. Banks concerning a dividend on Lake Shore stock. (Gov. Ex. F, R. 263.)

> It has been customary for a number of years for the Chicago, Lake Shore and Eastern to declare an extra dividend of five percent on its Capital Stock during the month of December, and payable on or before the thirtieth day of December, and on the same date for the E., J. & E. to declare its regular four percent dividend.
>
> *Will you kindly take the matter up and see if we shall take same action this year?* [Italics supplied.]

On November 12, 1923 Mr. Banks wrote to Judge Gary that he would like to declare certain dividends on appellee's stock "if it meets with your [Judge Gary's] approval." (Gov. Ex. F, R. 264.) Mr. Filbert replied that Judge Gary had approved the recommendation. (*Ibid.*)

On December 15, 1924 Mr. Filbert wrote to Mr. Banks (Gov. Ex. F, R. 267):

> I beg to advise you that I reported today to Judge Gary the conclusion you and I reached last week to the effect that the E., J. & E. would declare a dividend of 4% on its Capital Stock this month and the C., L. S. & E. an extra dividend of 10% on its Capital Stock, and Judge Gary approved the same.

On November 29, 1929 Mr. Banks inquired of Mr. Filbert (Gov. Ex. F, R. 268):

> Will you please let me know as early as possible what dividends you would suggest we pay for the Elgin, Joliet and Eastern Railway in December 1929 in addition to our regular four percent dividend, and also if

> your suggestion is that we pay an extra ten percent dividend on the Chicago, Lake Shore and Eastern in December 1929?

A similar letter was written November 26, 1930. (Gov. Ex. F, R. 269.) Also on December 1, 1931. (Gov. Ex. F, R. 271.)

Several letters from Judge Gary to appellee's president are in substantially the following form (Gov. Ex. F, R. 261):

> It is recommended that the Directors of Elgin, Joliet and Eastern Railway Company at a meeting to be held sometime during the current month, declare a dividend of 4%, $400,000.00, on the capital stock, payable on or before December 30, 1921.
>
> Kindly acknowledge receipt.

See also letters of December 17, 1923, December 20, 1926, November 29, 1930, and December 8, 1931. (Gov. Ex. F, R. 266, 267, 270, 272.)

Mr. Banks testified: "As to what action, if any, the E., J. & E. Board of Directors took in the matter of dividends: I would suggest what the dividends are and they passed a resolution authorizing the payment." (R. 35.) That was after he had taken the matter up with Judge Gary or Mr. Filbert. (R. 35.) Mr. Banks testified that as a rule he took up the matter of dividends with Judge Gary or Mr. Filbert.[12] (R. 35, 56.)

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[12] Mr. Filbert recalled one instance in which there was disagreement between him and Mr. Banks, Mr. Banks declaring a larger dividend than Mr. Filbert thought advisable. (R. 56.)

Directors' approval of contracts.—Further illustration of the subordinate part played by appellee's directors is found in the method of approving contracts. At the annual meeting of appellee's directors held in June, the president reports to the board the contracts that have been entered into during the year, and they are approved by the board. (R. 38, 46.) This was the procedure followed with respect to all contracts, some 2313 in number, executed on behalf of appellee between 1910 and 1933.[13] (R. 38, 44.) Thus, appellee's directors are called upon to exercise their discretion after the contracts have been executed, and, indeed, when the directors' approval is given the contracts may already have been performed. (R. 46.)

Location of offices.—Appellee's general offices and those of the Illinois Steel Company, one of the producing subsidiaries, are located in the same building at 208 South La Salle St., Chicago. (R. 6, 17.) Other subsidiaries of the Steel Corporation also have offices in that building. (R. 123.) Appellee leases its space from the Illinois Steel Company. (R. 6, 17.) Appellee also has a New York office at 71 Broadway (Def. Exs. 36–40, R.

[13] This does not include the agreement modifying the trackage agreement with the Chicago and Eastern Illinois Railway Company, which was approved by a special resolution of appellee's directors some two months after the modification had been executed. (Gov. Ex. C, R. 178–179; Def. Ex. 2, R. 399.) (*Infra*, p. 84.)

429), which is the office of the United States Steel Corporation. (R. 78.)

Division counsel.—One firm of lawyers is designated as division counsel for all subsidiaries in the Chicago district. (Gov. Ex. H, R. 278–281; R. 35, 103.) On February 16, 1920, Mr. Filbert wrote to Mr. Banks (Gov. Ex. H, R. 278–279):

> I beg to advise that on recommendation of Mr. W. W. Corlett, General Solicitor, approved by Judge E. H. Gary, Chairman, an increase has been made, effective January 1, 1920, in the annual allowance to Knapp & Campbell, Division Counsel, Chicago.
>
> Because of this advance and in order that the apportionment of their total allowance to the subsidiary companies may more equitably reflect the services rendered to the respective companies interested, a revision has been made of the amounts chargeable the several companies. Under this revision your company is allotted the annual sum of $14,000 dating from January 1, 1920.
>
> Bills for the monthly amounts will be rendered as heretofore by Illinois Steel Co. We trust the arrangement will be satisfactory to you.

And see similar letter of January 4, 1923, notifying appellee that its share of the annual compensation paid to division counsel was increased to $23,940.00. (Gov. Ex. H, R. 279–280.) Indeed, as indicated above, at least until 1925 (Gov. Ex. H, R. 280–281) appellee did not pay its share of the compensation

directly to the division counsel, but was billed monthly by the Illinois Steel Company. For a number of years appellee has paid the division counsel directly. (R. 103.)[14]

Meetings of presidents.—The United States Steel Corporation holds periodical meetings of the presidents of the subsidiaries. (Gov. Ex. A, R. 127–131; R. 5–6, 16, 26–27, 48, 119, 122–123.) These meetings are called to discuss the results of past operations and the prospects for business in the future. (R. 27, 48, 119.) Mr. Banks, president of appellee from 1901 to 1931, testified that there might be several meetings a year and that while he did not attend all of them, he "attended probably half of them, maybe more." (R. 26.) The documentary evidence discloses that during the year 1931, appellee's president was summoned to meetings held on May 21, June 11, and October 22. (Gov. Ex. A, R. 130–131.) Thus, on October 5, 1931, Mr. Farrell,[15] president of the U. S. Steel

[14] It is a curious commentary on this situation to find the Comptroller of the United States Steel Corporation on January 28, 1925 taking up with the secretary and treasurer of the Illinois Steel Company the method by which appellee should pay its share of division counsel's compensation. (Gov. Ex. H, R. 280–281.)

[15] Note Mr. Farrell's letter of July 11, 1929, to appellee's president (Gov. Ex. A, R. 128):

"Please have Mr. S. M. Rogers come prepared to make a report on the operations of your company at our next Presidents Meeting, which is to be held on July 25th.

"This report need not be in too much detail but it should be a comprehensive review of your activities."

Corporation, wrote to appellee's president (Gov. Ex. A, R. 131):

> Kindly arrange to attend conference of Corporation Officials in this office on Thursday, October 22nd, 10:30 A. M. Advise.

And see telegrams of July 2, 1929, and July 3, 1929, and letters of May 1, 1931, and June 1, 1931. (Gov. Ex. A, R. 127, 128, 130.)

3. Control of capital expenditures

The subsidiaries of the Steel Corporation, including appellee, may not make expenditures for improvements, except those minor in extent, without first obtaining the approval and consent of the Finance Committee of the Steel Corporation. (R. 49–52.) At the present time only those expenditures for improvements involving an outlay of less than $5,000 do not require the approval and consent of the Finance Committee. (R. 50–51.)[16]

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[16] From 1920 to 1932 the limit was $10,000. (R. 50–51.) See letter of May 10, 1920, (Gov. Ex. K, R. 302) from W. J. Filbert, Comptroller of the Steel Corporation, to presidents of subsidiary companies, which refers to the resolution of the Finance Committee increasing the limit from $5,000 to $10,000 and which states: "Under the above ruling, the limit of appropriations for improvements which may be entered as so-called 'Company' appropriations and the work thereunder commenced without first obtaining recommendation of the Finance Committee, is raised from $5,000 to $10,000, but all such appropriations should as heretofore be promptly forwarded to the Corporation in accordance with the existing rules. Will you please advise such officials and departments of your company as are interested." By a resolution of the

The procedure by which the approval of the Finance Committee was obtained is fully described in the testimony of Mr. Filbert, formerly Comptroller of the Steel Corporation and now Chairman of its Finance Committee. (R. 48, 49–52.)

> * * * Whenever a subsidiary desired to undertake a piece of work which involved a capital expenditure it submitted to the Corporation a form which was termed an appropriation request. That form was a communication addressed by the local officer or officers of the respective subsidiary, any individual subsidiary company, to the president of that company, indicating the probable amount of money that was desired to expend and the general purpose for which it would be expended. That form, if it met with the approval of the subsidiary's president, was so endorsed by him and submitted

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Finance Committee on April 19, 1932, the limit was reduced from $10,000 to $5,000. (Gov. Ex. K, R. 303.)

All purchases of land irrespective of amount must be approved either by the Finance Committee or by the President or Chairman of the Steel Corporation. (Gov. Ex. K, R. 303–304; R. 53.) Although prior approval is not required in the case of expenditures below the limit, the subsidiaries are required, even as to such expenditures, to make a report to the Steel Corporation. (R. 52, 97; Gov. Ex. K, R. 303.) And if it is desired to make an additional expenditure on an improvement project which did not require the approval of the Finance Committee because below the limit, it is necessary to obtain the approval of the Finance Committee for the additional expenditure if the amount thereof, together with the amount of the original expenditure, exceeds the limit. (Gov. Ex. K, R. 303.)

> to the Steel Corporation. * * * It was reviewed, looked over and presented to the Finance Committee of the Corporation. If the Finance Committee was agreeable to the making of that improvement it was endorsed with the recommendation of the Finance Committee. After the Finance Committee was through with it, it was sent back to the president of the subsidiary company. Then on the basis of receiving that advice the president proceeded with the work, making the expenditures approved. (R. 50.)

Instructions have been issued from time to time by the Steel Corporation to the subsidiary companies outlining in great detail the rules and procedure governing the subsidiary companies in the matter of expenditures for improvements. (Gov. Ex. K, R. 292–307; R. 50–51.) The practice commenced in 1908 and has continued to the present time. (R. 51.)

The importance of this requirement, as applied to the appellee, is shown by the fact that out of an annual average capital expenditure of approximately $900,000 during the years 1926 to 1930, inclusive, an average of over $600,000 per year required prior approval by the Steel Corporation. (Def. Ex. 27, R. 414.) In 1930 appellee made capital expenditures of $1,910,755.74, and of these $1,315,773.81 were in the class of expenditures for which the approval of the Steel Corporation was obtained. (*Ibid.*) The total capital expenditures

for the five years from 1926 to 1930, inclusive, amounted to $4,597,925.35, of which $3,153,817.36 were similarly in the class requiring approval by the Steel Corporation. (*Ibid.*) It is, of course, of no significance that there were more expenditures for improvements *in number* (but not in amount) made by appellee without first obtaining approval by the Steel Corporation. (See Def. Ex. 27, R. 414.) This would obviously be the case, but the significant fact is that all capital expenditures of any consequence required the approval of the Steel Corporation, and such expenditures during the five year period in question constituted nearly 70% of the total of capital expenditures.

Appellee sought to create the impression below that this requirement was not rigidly adhered to by the subsidiary companies (see R. 37), but Mr. Filbert could recall no specific instance during the past five years in which appellee or the other subsidiaries mentioned in this suit had made expenditures without obtaining approval, nor could he recall any instance in which they had ever acted in defiance of the refusal of the Steel Corporation to approve expenditures. (R. 52.) That the Steel Corporation expects this requirement to be rigidly complied with is not seriously open to dispute. (See Gov. Ex. D, R. 183.)[17] Nor is it material that

[17] This is a circular letter from the president of the Steel Corporation to all subsidiary presidents, sent on June 5, 1914, to Mr. Banks, president of appellee, stating: "It has

appellee's officers could recall no instance in which the Steel Corporation had refused to approve an expenditure requested by appellee. (R. 37, 97.) The significant fact is that the Steel Corporation requires its approval to be obtained, may reject or approve an expenditure, and insists on rigid adherence to its decision.[18]

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been recently remarked with emphasis by members of the Finance Committee that changes are made in regard to new work which increase the total cost above appropriation without previous consideration by the Finance Committee and even without notice to this office. *The rules for procedure have been heretofore stated, and the object of this letter is to call your attention to the necessity of complying rigidly with the instructions heretofore given.*" [Italics supplied.]

[18] There is considerable documentary evidence showing how in actual practice the matter of approval of capital expenditures was conducted as between appellee and the Steel Corporation. (See particularly Gov. Ex. D, R. 183, 186, 198–202, 204–205, 206, 209–210, 211–220, 223–224, 225–228.) Specimen "appropriation requests" are shown in Gov. Ex. T, R. 357–363. The form of these requests was originated in the office of the Comptroller of the Steel Corporation. (R. 51.) The attitude of appellee's president with respect to the procedure outlined by the Steel Corporation is sufficiently shown by his letter of January 28, 1926 (Gov. Ex. D, R. 199) in which he stated: "It is our desire to cooperate with you in this matter to the fullest extent, and if any future appropriations are not prepared in just the manner in which you desire, would appreciate it if you would call the matter to my attention, so that any errors may be promptly rectified."

A good example of the close supervision maintained by the Steel Corporation is found in the series of letters relating to the approval by the Finance Committee of the drilling of a well by appellee involving a relatively small out-

4. Control of surplus funds: the advance account

The "Advance Account" is the name of the account between the Steel Corporation and any of its subsidiaries showing the balance due to or from the Steel Corporation. (R. 54.) It represents mainly loans by the Steel Corporation to subsidiary companies who are in need of funds and the deposit by such companies with the Steel Corporation of surplus funds. (R. 54.) Appellee's Advance Account with the Steel Corporation has never shown a debit balance against appellee. (R. 72.)

The Steel Corporation pays 2½% interest on funds in this account (R. 68) and deposits the funds received from appellee for this account in its own banks along with its other funds used for the current requirements of the Steel Corporation or of its subsidiaries. (R. 66, 68.) During the period from 1920 to 1933 the funds which the Steel Corporation received from appellee as deposits in the Advance Account aggregated $79,000,000. (R. 71–72.)

When appellee desires to withdraw from this account it notifies the treasurer of the Steel Corporation that it will draw on a certain day for a certain purpose (R. 71) and thereafter a draft

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lay (Gov. Ex. D, R. 199–202, 208) and the approval by the Finance Committee of an additional expenditure for that project (Gov. Ex. D, R. 223–224, 225–226). See particularly the letter of January 16, 1928 (Gov. Ex. D, R. 200) and the telegrams of December 1 and December 2, 1931 (Gov. Ex. D, R. 225).

is drawn on the Steel Corporation (R. 71) and deposited for collection in appellee's bank. (R. 64–65.)

Appellee insisted in the court below that although the withdrawal was by draft which requires acceptance by the Steel Corporation, nevertheless the Advance Account was in practice a demand account subject to withdrawal without notice and without the consent of the Steel Corporation, and there was testimony to the effect that the money in this account is like an ordinary bank deposit and that the approval of the Steel Corporation was not required in order to obtain cash (R. 64–65), that drafts are paid promptly (R. 69), and that prior notification of the withdrawal was given to the Steel Corporation not because it was necessary but merely as a "matter of courtesy" (R. 72). But the Government's assertion that the funds in this account may be withdrawn only on the consent of the Steel Corporation does not rest merely upon the fact that the withdrawal is by draft which requires acceptance, but is shown by definite documentary evidence. On August 17, 1932, appellee's treasurer wrote to the treasurer of the Steel Corporation as follows: "In our August forecast, we have made provision for the withdrawal from our Advance Account of $100,000.00, which we believe at this time will be required some time during the latter part of this month. It is not our intention to with-

draw from our Advance Account the above amount or any part thereof unless occasion requires. Should we find it absolutely necessary to take this action, will you kindly advise whether we can have your approval of such withdrawal." (Gov. Ex. E, R. 259.) The reply was as follows: "It will be in order for you to draw $100,000.00 against your Advance Account if it is absolutely necessary." (Gov. Ex. E, R. 260.) In a letter of June 30, 1922, from appellee's assistant general auditor to its general auditor it was stated: "Nevertheless, I realize that as you state, this money is not 'free' cash as it is not subject to draft, without notification and consent." (Gov. Ex. E, R. 246.)

The deposits made by appellee in this account are sometimes made at the request of the Steel Corporation and sometimes voluntarily (R. 71–72). Of the total aggregate deposits of $79,000,000.00 during the years 1920 to 1933, $32,000,000.00 were made at the request of the Steel Corporation (R. 71–72). The frequency with which the Steel Corporation makes requests upon appellee for substantial deposits in this account is shown by the correspondence in Gov. Ex. E, R. 248–250. (See R. 66–68.) Thus on December 18, 1928, the treasurer of the Steel Corporation wrote to appellee's treasurer: "Please deposit to credit United States Steel Corporation in Continental National Bank and Trust Company two million dollars on or before Decem-

ber 24th. The amount will be credited to you in Advance Account." (Gov. Ex. E, R. 248.) See similar letters of June 29, 1929, calling for deposit of $500,000.00 on or before July 6, 1929 (Gov. Ex. E, R. 248); of August 21, 1929, calling for deposit of $1,000,000.00 on or before August 27, 1929 (Gov. Ex. E, R. 249); of September 16, 1929, calling for deposit of $1,000,000.00 on or before September 23, 1929 (Gov. Ex. E, R. 249); and of October 14, 1929, calling for deposit of $1,000,000.00 on or before October 21, 1929 (Gov. Ex. E, R. 249). Although the treasurer of the Steel Corporation testified that "there was nothing compelling about such requests" (R. 69), there was only one instance testified to in which such request was not honored and in that instance it appeared that appellee could not make the deposit because it had no excess cash. (R. 68, 70.)

5. Control of the clearing of inter-subsidiary transactions

In 1901 the Steel Corporation established and has since maintained the "United States Steel Corporation Clearance Account" by which monthly settlement is made of accounts arising between its various subsidiaries, including appellee. (Gov. Ex. E, R. 230–233; R. 53–54.) This account does not provide for settlement of freight charges or traffic claims due between appellee and the other subsidiaries, but it does provide for the settlement of all

other accounts. (R. 54.) The clearance account is handled in the office of the Steel Corporation under the direction of the Comptroller. (R. 54.) Interest is charged on debit or credit balances due in the clearance account and the rate of interest is decided very largely by the treasurer of the Steel Corporation. (R. 54.) The circular announcing the plan gave in detail the procedure to be followed by the subsidiaries and prescribed the forms to be used. (Gov. Ex. E, R. 230-233.) Among other things the circular stated: "It will be observed that under the foregoing plan all questions of discounts for settlement of accounts prior to a certain date (except in case of prepayment of ore contract instalments) are naturally eliminated, since no transfers of cash will be permissible in payment of accounts included in clearance balances except as provided." (Gov. Ex. E, R. 233.) Thus the appellee or any other subsidiary is precluded from obtaining such better terms for the settlement of accounts with other subsidiaries as might be possible under a condition of free bargaining.[19]

[19] Appellee stated in its brief below that its use of the clearance account was nominal. That this cannot be so is shown by the fact that appellee purchases practically exclusively from other subsidiaries such of its materials and supplies as are produced by them. (R. 73.) The documentary evidence shows that the settlement of the clearance account for the month of January, 1932, resulted in a balance due from appellee of $55,321.97. (Gov. Ex. E, R. 254.)

6. Bonus Plan, Pension Plan and Stock Purchase Plan

Bonus Plan.—The employees and officers of appellee participate in the same manner as all employees and officers of the Steel Corporation and of its other subsidiaries in a "Profit Sharing Plan" adopted in 1921 by the stockholders of the Steel Corporation (Gov. Ex. L, R. 309–321; R. 57–58). Under this plan, when the profits of the Steel Corporation exceed one hundred million dollars a certain percentage of the profits is set aside for distribution to the officers and employees of the Steel Corporation and its subsidiary companies who have performed unusual and meritorious service. (R. 58.) A committee elected by the stockholders of the Steel Corporation allots the fund among the employees of the Steel Corporation and of its subsidiaries.[20] (R. 58; Gov. Ex. L, R. 309–321; Gov.

[20]Appellee's suggestion that the Committee merely fixes the amount to be distributed to the various subsidiaries but does not designate the amounts to be paid to their employees is refuted by the documentary evidence. Thus in the letter dated February 4, 1931 from the Comptroller of the Steel Corporation to appellee's assistant auditor (Gov. Ex. I, R. 281–282) it was stated: "The amount fixed for your Company by the Committee of Stockholders having control of the distribution of the Fund for 1930, provided in accordance with the Profit Sharing Plan for employees, is $28,930. * * * As soon as allotment and distribution to individual employees are made we will send your President a detailed schedule of same." It will be noted that in this letter the Comptroller gave detailed instructions concerning the accounting entries to be made by appellee. In the circular

Ex. I, R. 281.) The Steel Corporation pays the entire amount of the fund to the Profit Sharing Committee and requests the subsidiary companies to remit the proportion of the fund allotted to them (R. 58; Gov. Ex. I, R. 281–282). It is to be noted that under this plan, the determination of whether bonuses should be paid depends not upon the earnings of a particular subsidiary but upon the joint earnings of all subsidiaries as reflected in the profits of the Steel Corporation, that the amount to be distributed by a subsidiary as a bonus to its employees is determined not by it but by a committee of the stockholders of the Steel Corporation, and that this committee even designates the par-

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which the Committee sent on February 9, 1926 to the officers and employees of the Steel Corporation and of its subsidiary companies (Gov. Ex. L, R. 311–312) it was stated: "As provided and authorized by the Plan, the Committee elected by the stockholders to administer the same has designated the employees of the Corporation and its subsidiary companies qualifying for participation in the Fund and has allotted the amount of the Fund to such designated employees in the manner provided by the Plan. * * * all questions relating to the interests, rights, and claims of any officer or employee in, or growing out of, the proposed distributions and fund above specified shall be finally determined and disposed of in its discretion by the Committee of Stockholders of the United States Steel Corporation, elected from time to time to administer the Profit Sharing Plan, as said Committee may be constituted when and as any questions arise." Substantially the same statements appear in the circulars sent out February 2, 1924, February 3, 1925, February 8, 1927, February 14, 1928, February 5, 1929, February 4, 1930, and February 3, 1931 (Gov. Ex. L, R. 307–321).

ticular employees of a subsidiary to whom bonuses should be paid.

Pension Plan.—All employees of the Steel Corporation and of the subsidiaries which it controls participate in the same manner and under the same regulations in the benefits of the "United States Steel and Carnegie Pension Fund", which is a Pennsylvania corporation created in 1910 and to which $8,000,000 was contributed by the Steel Corporation and $4,000,000 by the trustees of the Andrew Carnegie Pension Fund. (Gov. Ex. Q, R. 348–354; R. 56–57, 59.) When the income from this fund is insufficient to meet the pensions the Steel Corporation advances to the pension fund on behalf of its subsidiaries the amount of the deficit and renders semi-annually a charge account against each of the subsidiary companies for its proportion of the deficit. (R. 56–57; Gov. Ex. G, R. 276.) The general plan for entering on the books of the subsidiaries the amounts expended for pensions was outlined by the Comptroller of the Steel Corporation. (R 57; Gov. Ex. G, R. 274–276, 277–278.) The fact that appellee's president determines what employees are to be retired on pension (R. 59) is obviously of no significance, since the pension rules of the "United States Steel and Carnegie Pension Fund" (Gov. Ex. Q, R. 348–354) prescribe in detail the circumstances under which pensions may be obtained, the amount of the pensions and the procedure for obtaining them.

Stock Purchase Plan.—The employees and officers of appellee participate in the same manner as officers and employees of the Steel Corporation and of the producing subsidiaries in a plan under which such officers and employees are accorded the privilege of purchasing common stock of the Steel Corporation below its market price in proportion to the salary of the particular officer or employee. (R. 7, 19.) This plan provides for deferred payment for the stock, the Steel Corporation retaining custody thereof until the purchase price is fully paid. (R. 7, 19.) If an officer or employee leaves the employ of the Steel Corporation or of the subsidiary before completing payment for stock so purchased he loses his right to such purchase. (R. 7, 19.) In such a case the officer or employee is reimbursed for the amounts paid in by him plus interest at 5% and the stock is retained by the Steel Corporation. (R. 7, 19.)

7. Reports, budget estimates, inter-subsidiary purchases, and bank accounts

Reports.—The Steel Corporation maintains an elaborate system of reports from its subsidiaries. The subsidiaries render daily or weekly reports of their bank balances. (R. 55.) They report all expenditures for capital purposes, whether above or below $5,000.00. (R. 52–53.) In the case of purchases or contracts for capital account in the amount of $1,000.00 (previously $500.00) or over,

the subsidiaries file with the Steel Corporation copies of the contracts and of the bids made.[21] (Gov. Ex. D, R. 182, 184, 189–191, 191–192, 196, 222–223.) The subsidiaries render weekly and quarterly reports of purchases made from outside companies. (R. 72–73; Gov. Ex. J, R. 287–291.) The subsidiaries submit quarterly reports showing the estimated amounts which they will expend during the succeeding five or six months for capital expenditures already approved. (R. 53; Gov. Ex. D, R. 203–204.)

Budget estimates.—Until as late as the end of 1931 the Steel Corporation obtained from its subsidiaries "budget estimates", consisting of a statement of the expenditures for betterments and improvements contemplated for the ensuing year, and an estimate of such expenditures for two years thereafter. (R. 53; Gov. Ex. D, R. 204, 205–206, 207–208, 209, 218, 220–221, 223, 224–225.) This practice has been abandoned during the past three years, apparently because of the depression. (R. 53.)

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[21] It would appear from the letter of January 14, 1924, in Gov. Ex. J, R. 290, that at least when that letter was written, this data was filed also as to purchases or contracts amounting to $1,000.00 or over, although not made under appropriations, that is, not for capital account. On March 25, 1924, the limit was increased to $10,000.00 in the case of such non-capital expenditures. (Gov. Ex. D, R. 197.)

See also Gov. Ex. D, R. 197–198 (monthly reports of expenditures); and Gov. Ex. D, R. 193–194.

Inter-subsidiary purchases.—Appellee purchases practically exclusively from the Steel Corporation subsidiaries such of its materials and supplies as are produced by them.[22] (R. 73.) As previously

[22] In a letter of April 25, 1917 to Mr. Farrell, president of the Steel Corporation, Mr. Banks, appellee's president, stated (Gov. Ex. J, R. 286):

"We sell all of our scrap to the Illinois Steel Company, and that Company fixes the price that they will pay for the scrap. It is based on the price shown in the Iron Age Review for the week shipments are made. However, that does not apply to our rails. We could sell our rails to outsiders at a higher price than paid us by the Illinois Steel Company. We are, therefore, so far as our Company is concerned, placed at a disadvantage. We have no means of making a saving either in our sales or purchases."

At the trial Mr. Banks repudiated these statements. (R. 101–103, 103–104.)

In view of the importance of coal purchases to a railroad company, the evidence concerning such purchases is of particular interest. Appellee's purchasing agent testified (R. 73) that appellee purchases all of its coal from United States Fuel Company, one of the Steel Corporation subsidiaries, and that: "As to how the price we pay for the coal is determined: The invoice price is the published price shown in the Quarterly report. Government Exhibit N is recognized as the Quarterly Price Report inter-company prices. I have that at my disposal at all times. It is issued quarterly, each quarter. In a general sense it is published by the United States Steel Corporation." He said (R. 73) that it is an advantage to appellee "in having coal of one type continuously instead of alternating with different types of coal", and that the prices paid the Fuel Company would probably be comparable with prices of outside mines. (Appellee introduced a comparison of cost of coal purchased by it during 1917 from United States Fuel Company with estimated cost of coal from outside companies, Def. Exs. 28, 29, 30, R. 415–416.) Speaking of United States Fuel Company the wit-

stated, appellee makes a weekly and quarterly report of all purchases made from outside companies. (R. 72; Gov. Ex. J, R. 287–291.) The purchases by the producing subsidiaries from outside companies are supervised by the Purchasing Agents' Committee of the Steel Corporation,

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ness said (R. 100): "There is no other company that we have any interest in down in that region" (Danville District, Illinois). During the period 1926 to 1930, inclusive, appellee spent, annually, from $1,516,732.83 to $1,027,806.69 for coal purchased from United States Fuel Company (Gov. Ex. W, R. 364). On two occasions appellee purchased coal on "bids": First, during Government control of railroads in 1919, at the direction of the Regional Purchasing Committee, the head of which Committee was in no way connected with appellee (R. 74; Def. Exs. 3 and 4, R. 400–402), and, second, "during the strike of two years ago."

Contrast the correspondence in Gov. Ex. J, R. 283–287, with appellee's affirmative allegation (R. 16) that "in all its affairs * * * it is as free and independent as any railroad company is free and independent of its stockholders": The Steel Corporation's Vice President wrote Mr. Banks, Oct. 21, 1914: "We think it very important that purchases of all grades of coal on the outside be kept at a minimum." (R. 283.) Mr. Banks replied, Oct. 23, 1914, that, while appellee had previously bought some outside coal (R. 283–4), "We are not buying any coal from any outside parties and are confining all of our purchases to the Bunsen Coal Company" [a subsidiary of the Steel Corporation, R. 103]. The Steel Corporation's Vice President again wrote Mr. Banks, Oct. 21, 1915 (R. 284): "As you probably know, operations at Bunsen Coal Company have been curtailed recently, and we think the question of shutting off shipments of coal from outside mines should be gone into carefully, and *where it is to the Corporation's interest* to take coal from the Bunsen Coal Company it should be done." (Italics supplied.) Mr. Banks replied Oct. 25, 1915, that appellee's purchase of coal from outside mines "was discontinued September 30th."

which consists of representatives of the various producing subsidiaries. (R. 70.) The function of that committee is also to secure information on purchases made from all subsidiaries of the Steel Corporation. (R. 70.) No officials of appellee are on the committee at the present time, although they

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(R. 284.) On April 21, 1917, appellee received an invoice from the United States Fuel Company for coal from March 27 to April 7, which showed an advance of 58 cents per ton over previous prices, whereupon Mr. Banks wrote the President of the Steel Corporation concerning this advance (R. 285), saying: "The first intimation we had was the rendering of the bill. This advance in fuel will cost the E. J. & E. road between $350,000 and $400,000 a year." Upon receipt of the reply of the President of the Steel Corporation, stating that the price charged was that named in the inter-company price list, which he believed to be lower than market prices (R. 285), Mr. Banks again wrote (R. 286) the President of the Steel Corporation, April 25, 1917, that appellee had not received the price list and was "only advised of changes in the price of coal when we receive the invoice. Everything purchased by the E. J. & E. Ry. Co. from any of the Subsidiary Companies (and we make no purchases outside of any material that can be supplied by Subsidiary Companies) we have to pay whatever price is marked on the invoice, and it is the market price at the time of shipment."

To this, the President of the Steel Corporation replied, May 14, 1917 (R. 286–287), explaining the reasons for the increased price, and saying: "It is appreciated this advance in price will increase your operating expenses. But this is also true of many of your other supplies and expenses. It is something every railroad is facing under prevailing conditions. We have written you in detail on this matter, desiring to present a complete exposition of the situation in order that you may fully understand the price in question was arrived at from a full and fair consideration of the interest of all parties concerned."

have attended in the past. (R. 70.) See also Inter-Company Price List governing raw material purchases (with some exceptions) between the producing subsidiaries. (Gov. Ex. N, R. 334–340.)

Bank accounts of subsidiaries.—Whenever a subsidiary wishes to open a new account at any bank it proposes to the Steel Corporation the name of the bank and obtains its advice as to whether it is a safe depository. (R. 55.) Mr. Filbert could recall no instance in which any subsidiary failed to follow the advice of the Steel Corporation. (R. 55.) As previously stated, the Steel Corporation is kept advised by daily or weekly reports of the balances in the bank accounts of the subsidiaries. (R. 55.) On June 10, 1932 the treasurer of the Steel Corporation advised appellee's treasurer that "we are making up a new list of the depositories of the Corporation and its subsidiary companies" and enclosed a blank form for that purpose, requesting that there be entered "in the specified columns the purpose for which the account is used and the rate of interest allowed." (Gov. Ex. E, R. 257–258, and see reply, Gov. Ex. E, R. 258.)

The record discloses various other matters, not considered under the previous headings, which illustrate the extent to which the Steel Corporation in practice supervises the affairs of appellee. See particularly, Gov. Ex. E, R. 235–236, 236, 237, 237–238, 240–241, 241–244, 247–248, 250–251; Gov. Ex. D, R. 185–186, 186, 192–193, 193, 194, 195, 195–196, 227–229.

8. Trackage agreement with the Chicago and Eastern Illinois Railroad Company

The Lake Shore Road (or its predecessor) had a trackage agreement with the Chicago and Eastern Illinois Railroad Company (hereinafter called Chicago and Eastern) before the formation of the Steel Corporation. (R. 30.) On February 1, 1909, a renewal was made of the prior agreement for a term of 50 years. (R. 46; Gov. Ex. Y, R. 389.) The trackage agreement gave the Lake Shore the right to run its freight trains over the tracks of the Chicago and Eastern to reach mines and quarries owned or controlled by subsidiaries of the Steel Corporation and to haul freight from those mines consigned to subsidiaries of the Steel Corporation. (R. 30–31.) Appellee succeeded to these trackage rights upon its lease on June 1, 1909 of the Lake Shore Road. (R. 31.) In substance, therefore, appellee acts as a private carrier for the subsidiaries of the Steel Corporation with respect to the freight which it hauls over the lines of the Chicago and Eastern under the trackage agreement. (See Gov. Ex. C, R. 157–158; Gov. Ex. Y, R. 393.)

This trackage agreement is significant because it gives concrete illustration of a particular kind of advantage which the ownership by shipping interests of a railroad may afford to such interests as compared with competitive shippers. To be sure, the subsidiaries of the Steel Corporation pay the same published rates to appellee for the haul over

the line of the Chicago and Eastern as other shippers pay to the Chicago and Eastern for a similar haul. But, of course, the revenues received by appellee ultimately are received by the United States Steel Corporation in the form of dividends. By virtue of the trackage agreement it is unnecessary for appellee to divide rates with the Chicago and Eastern. It is required simply to pay a rental. To the extent that the divisions which would otherwise have been payable to the Chicago and Eastern exceed the sum of the amount of the rental plus the cost to appellee of operating its trains over the tracks of the Chicago and Eastern, the Steel Corporation or its subsidiaries receive an advantage over their competitors just as surely as if they were charged a lesser rate for the haul. That the advantage was not merely a speculative one in this case is indicated by a memorandum obtained from the files of appellee (R. 26) which shows that based on operations from July to November, 1921 appellee would lose $310,000.00 every six months if the trackage agreement was discontinued and the Chicago and Eastern became entitled to divisions for the haul over its line. (Gov. Ex. C, R. 167–171.)[23]

[23] This memorandum shows that the revenues for the five month period in question would be reduced from $1,582,689.21 to $632,925.87 and that the expenses would be reduced from $821,798.23 to $131,187.42, making a net loss for the five months' period of $259,152.53. (Gov. Ex. C, R. 171.) The record shows that this memorandum was obtained from the files of appellee. (R. 26.)

Without its ownership of a railroad the United States Steel Corporation would be in no position to obtain such an exceptional advantage. To enter into a contract directly with the Chicago and Eastern for a lesser rate than charged to other shippers would constitute an unlawful preference. But by the use of a subsidiary railroad the appearance of preference is avoided, since the same rate is paid by the subsidiary producing companies to the subsidiary railroad as other shippers are charged by the Chicago and Eastern. Thus Mr. Banks, appellee's president for many years, testified in response to the inquiry as to whether the subsidiary manufacturing companies received any benefits by reason of the trackage agreement: "They paid the same freight rates, practically the same freight rates on shipments moving in our trains over our railroad to their plant as they would have paid if somebody else had hauled it from the same point." (R. 31.) This is true, but, of course, the amount paid by one subsidiary of the Steel Corporation to another subsidiary is merely a matter of bookkeeping. It is utterly without bearing upon the question as to whether real equality exists between the Steel Corporation and its competitors, that is to say, whether their actual transportation costs are equal.

In view of the importance to the Steel Corporation of this trackage agreement it is not surprising to find Judge Gary, chairman of the board, taking

an active part in the negotiations which resulted in 1920 to 1922 from the demand of the Receiver for the Chicago and Eastern for an increased rental. (Gov. Ex. C, R. 159–179.) The Receiver (then acting in the interest of the new company of which he was to become president) was in a position to make such a demand by reason of a provision in the foreclosure decree which enabled the purchaser at foreclosure to reject any contract made by the Chicago and Eastern. (Gov. Ex. C, R. 163.)

Mr. Banks took the matter up with Judge Gary in the latter's office on December 20, 1920, and was authorized by him to offer the Chicago and Eastern an additional 1¢ per ton. (Gov. Ex. C, R. 160, 161; R. 32.) This was unacceptable to the Receiver (Gov. Ex. C, R. 161–162), and it was thereupon decided to procure an option for trackage rights over the Chicago, Terre Haute and Southeastern Railroad. (R. 32; Gov. Ex. C, R. 161.) Mr. Banks testified that he first suggested that an option be obtained from the Chicago, Terre Haute and Southeastern, but that Judge Gary "may have suggested that I get an option so as to make it binding by paying a sum for it." (R. 32.) Mr. Banks' memorandum of the conference held on April 21, 1921, with Judge Gary reads as follows (Gov. Ex. C, R. 161):

> Judge Gary said in his office 4/21/21: Get Option for a contract for trackage over

C. T. H. & S. E. Ry., pay for option. Have K. K. Knapp draw it and then you will be in position to talk to C. & E. I. R. R.
AFB.

Mr. Banks gave full reports to Judge Gary of the course of negotiations with the Receiver and with the Chicago, Terre Haute and Southeastern [24] (Gov. Ex. C, R. 162–165, 171–175, 177–178) and Judge Gary participated in some of the conferences. (Gov. Ex. C, R. 173, 177.) It was doubtless a matter of grave concern to the Chicago and Eastern that if the trackage agreement was terminated it might lose to other carriers a large volume of traffic which it handled for various subsidiaries of the Steel Corporation. Thus on June 28, 1922, Mr. Banks wrote to Mr. Shearson, a director of the Chicago and Eastern, in response to an inquiry as to the amount of business received by the Chicago and Eastern from subsidiaries of the Steel Corporation (R. 32–33; Gov. Ex. C, R. 175–176), that the earnings of the Chicago and Eastern from United States Steel subsidiaries during the year 1921 amounted to over $1,300,-

[24] On February 6, 1922 Mr. Banks wrote to Judge Gary:
"Personally I feel that Mr. Byram [President of the Chicago, Milwaukee & St. Paul, of which the C. T. H. & S. E. was a subsidiary, R. 32] believes that we will not make use of the proposed option to operate over his line, that the C. & E. I. will not allow us to leave their road, but that if he is to give us an option, he wants something in return, and that is the right for the unrestricted use of our road between Joliet and Aurora." (Gov. Ex. C, R. 175.)

000.00, exclusive of the rental paid by appellee under the trackage agreement, and that (Gov. Ex. C, R. 176):

> The Steel Corporation through its various subsidiary companies contribute quite a bit to the gross earnings of the C. & E. I. Road, and I think you will quite agree with me that the Corporation's traffic is very desirable business, and it is in my mind a worth while saving, this tonnage and earnings to the C. & E. I. R. R. By far the larger part of this tonnage is competitive.

In the end, Mr. Banks proposed to compromise the matter with the Chicago and Eastern by offering an additional 2¢ per ton, "an increase of a little less than 20% over our present contract," if "my recommendation is acceptable to you [Judge Gary] and you approve it." (Gov. Ex. C, R. 177–178.) Judge Gary gave his approval (Gov. Ex. C, R. 178), and on October 18 and 20, 1922, the compromise was effected by an exchange of letters between Mr. Banks and the president of the Chicago and Eastern. (Gov. Ex. C, R. 178–179.) Judge Gary subsequently wrote to Mr. Banks that he believed that the directors of the appellee should approve and ratify the arrangements made (Gov. Ex. C, R. 179) and two months later the directors so acted. (Def. Ex. 2, R. 399.)

9. Lease of Lake Shore and Eastern Railway Company

By lease dated June 1, 1909, effective for 60 years, appellee acquired and operates all of the railroad properties of the Chicago Lake Shore and Eastern Railway Company, hereinafter called Lake Shore. (Gov. Ex. X, R. 365–376.) The lease was amended December 1, 1913, and again December 21, 1917. (Gov. Ex. X2 and X3, R. 376–388.) The documentary evidence relating to the consummation of this lease and of its subsequent amendments is voluminous. (Gov. Ex. B, R. 132–157.) This evidence is of the utmost significance in this case because it is another actual example of how the interest of the United States Steel Corporation as a shipper has operated in the past, and may continue to operate in the future, as the dominant factor in the conduct of the affairs of its subsidiary railroads in direct violation of the purpose of the Commodities Clause. It is also a striking i. ıstration of the active part taken by officials of the Steel Corporation in negotiations carried on by appellee. The Government, therefore, deems it essential to present to the Court a rather full analysis of this evidence.

The capital stock of the Lake Shore was and is owned by the Illinois Steel Company, one of the subsidiaries of the Steel Corporation. (R. 4, 15, 28, 66.) It served "practically one industry, the Illinois Steel Company." (Gov. Ex. B, R. 135.)

It had "a short haul of about eleven miles on the larger portion of traffic received from connecting lines" from which it obtained divisions. (Gov. Ex. B, R. 141.) Appellee, on the other hand, prior to its lease of the Lake Shore, received 75% of its business from the general public and only 25% from the Steel Corporation's subsidiaries. (Gov. Ex. B, R. 136.)[25]

The evidence establishes beyond doubt that the controlling purpose motivating the lease to appellee of the Lake Shore Road was to prevent the loss under governmental regulation of the divisions which the Lake Shore was receiving from connecting lines. The Interstate Commerce Commission had made an investigation and on November 3, 1904 had rendered a report entitled "In the Matter of Divisions of Joint Rates and other Allowances to Terminal Railroads," 10 I. C. C. 385, in which it dealt, among other things, with the relations between the Illinois Steel Company, the Lake Shore and the Steel Corporation and condemned as excessive the divisions which the Lake Shore received from connecting lines.[26] It was feared that under

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[25] In fact, over one-half of this 25% was received by appellee even before the formation of the Steel Corporation or of the Federal Steel Company. (Gov. Ex. B, R. 134.)

[26] "We are of the opinion in this case, * * * that the only service for which the railways transporting the traffic of the Illinois Steel Company to and from Chicago can properly charge is the switching service to and from the plants of that Company; that the divisions in question are much in excess of any fair charge for that service; that they

existing or new legislation the Lake Shore would be held to be entitled not to divisions, but only to a small switching fee. The practical effect of the loss of these divisions would, of course, be to increase the transportation costs of the Illinois Steel Company.

On July 20, 1905, Mr. Banks (president of both the Lake Shore and appellee) wrote to Judge Gary, chairman of the board of directors of the Steel Corporation, strongly advising the acquisition or lease by appellee of the Lake Shore (R. 27–28; Gov. Ex. B, R. 132). He wrote that since the appellee's business is that of a common carrier with 75% of its business derived from shippers other than the Steel Corporation or its subsidiaries, "the Interstate Commerce Commission could not take the position [if appellee should acquire or lease the Lake Shore] that the E., J. & E. Road served only the Illinois Steel Company, and was, therefore, only a terminal road organized for the purpose of securing larger divisions, which is another name for rebates. Besides, the earnings of the C., L. S. & E. Ry. Co., when spread over the

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are intended and understood to be in excess of what would be a reasonable charge; that they are, in fact, paid to secure the traffic of the Illinois Steel Company; and that they do, in fact, amount to a preference in favor of that Company by whatever amount they exceed a fair compensation for the service rendered. What that amount is cannot be determined upon this record; it is clear that it annually aggregates what to the ordinary apprehension is an enormous sum." (10 I. C. C. 385, 398.)

total mileage of the two roads, would not show up so abnormally large." (Gov. Ex. B, R. 132.) He believed "that it would be the best thing *for the Corporation*[27] to have" appellee purchase or lease the Lake Shore. (Gov. Ex. B, R. 132.) He stated that "any interest that the Illinois Steel Company has in the C., L. S. & E. is simply a question of bookkeeping * * *. Any profits made one way or the other *for the Corporation as a whole,* and how it should be distributed, is a matter that can be determined upon *by the Corporation;* so long as we keep our profits at home, *the Corporation is not the loser.*" (Gov. Ex. B, R. 132.)

On October 18, 1905, Mr. Banks again wrote to Judge Gary urging the lease by appellee of the Lake Shore Road (Gov. Ex. B, R. 133–134). He felt that the Lake Shore "will again be attacked by the Interstate Commerce Commission on the ground of its being a purely Terminal or Switching Road" and he believed "it to be to the best interests *of the Corporation*" that a lease should be made. (Gov. Ex. B, R. 133.) He stated that in his opinion a lease would "stop all further talk or action against the C., L. S. & E. Ry. for being a strictly industrial railroad, as the E., J. & E. Ry. today derives seventy-five per cent of its earnings from business other than that of the constituent companies of the Corporation, and over half of the 25% of the business which the E., J. & E. handles

[27] Italics supplied unless otherwise indicated.

for constituent companies of the United States Steel Corporation, is business that the E., J. & E. Railroad enjoyed before the formation of the United States Steel Corporation or the formation of the Federal Steel Company." (Gov. Ex. B, R. 134.) He noted that "all of the Eastern Roads are making a very determined fight to eliminate divisions with so-called industrial roads and terminal roads, giving them in lieu of divisions, a nominal switching charge." (Gov. Ex. B, R. 134.) Concerning the basis upon which the lease could be made, he stated that "the U. S. Steel Corporation being owners of both properties, this matter could easily be arranged, and I believe if the lease was made we can materially reduce the operating costs of the Illinois Steel Company by reducing the rates between Buffington and South Chicago, rates that we now hold at a rather high figure in order to maintain our divisions that we exact from our connections, a matter that you are thoroughly familiar with, as it was talked over very fully between you, Mr. Knapp and myself when the subject of coke divisions was under consideration." (Gov. Ex. B, R. 134.) He asked Judge Gary to consider his suggestion and advise if he did not "now think it advisable to arrange to bring the two Roads together." (Gov. Ex. B, R. 134.)

Judge Gary replied on October 20, 1905, that "if you can get Mr. Knapp's opinion that from a legal standpoint the lease should be made, and you and

Mr. Buffington then agree, *I shall be glad to take up the whole question for final disposition.*" (Gov. Ex. B, R. 135.)

On December 28, 1905, Mr Banks again wrote at length to Judge Gary. (Gov. Ex. B, R. 135–137.) He stated that "after reading the President's message to Congress" he was "more firmly convinced than ever of the urgent necessity of putting these two properties together." (Gov. Ex. B, R. 135.) He was of the opinion that "Congress will undoubtedly pass a law giving greater authority to the Interstate Commerce Commission, as special mention was made by the President in reference to Terminal and so-called Industrial Roads." (Gov. Ex. B, R. 135.) "It is unfortunate," he wrote, that the Lake Shore "serves practically one industry, the Illinois Steel Company * * *. The question of allowances to Terminal Railroads will not down, and if other so-called Industrial Railroads will accept switching charge of $2.00 or $3.00 per car for services practically identical with that performed by the C., L. S. & E. Ry. then it is only a question of time (and a short time at that), when the C., L. S. & E. Ry. is forced to give up its divisions and accept a nominal switching charge for its service." (Gov. Ex. B, R. 135–136.) He believed that "*the Corporation will be benefited, as a whole*", by the lease and that while it "will, undoubtedly, prove a hardship to the Illinois Steel Company", it was better in his opinion

"that the Illinois Steel Company, as a constituent company should suffer some loss and the Corporation benefit by the same, than to have the Illinois Steel Company suffer a loss and the Corporation not benefit by the same." [28] (Gov. Ex. B, R. 135.) He asked Judge Gary for "an early reply from you as to your wishes in this matter." (Gov. Ex. B, R. 137.)

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[28] It is of interest to note Mr. Banks' comment on the suggestion which had been made that the Illinois Steel Company should acquire the capital stock of appellee, "thus reducing the manufacturing cost of the Illinois Steel Company by taking up the profits" of appellee: "I do not believe that would be policy, and for this reason: 75% of the present business of the E., J. & E. Road is derived from business other than that of the Corporation. I mean by that, that 75% of the present earnings of the E., J. E. Ry. is received on its local business and its through business that has no connection in any shape or manner with the business of the United States Steel Corporation. If it were known, and, of course, it would be known, that the Illinois Steel Company was the owner of the E., J. E. Road, we would be placed in the position of being attacked by every shipper over the E., J. & E. Ry., with discriminating in our cars and service in favor of the Illinois Steel Company. That charge has recently been made to me by the Coal Operators on the E., J. & E. Road, who stated that prior to the formation of the Federal Steel Company, they were at all times amply supplied with E., J. & E. equipment for their coal mines; that since the formation of the Federal Steel Company, that the Illinois Steel Company has had the first call on E., J. & E. equipment and that their mines have not been supplied with cars. *Unfortunately this is true to a certain extent, as we have endeavored at all times to take care of the constituent companies of the Corporation in supplying them with cars.*" [Italics supplied.] (Gov. Ex. B, R. 136.)

After conferring with Mr. Banks and Mr. Knapp, Mr. Buffington, president of the Illinois Steel Company, wrote to Judge Gary that they had concluded to recommend the lease "in the light of recent developments concerning railroad matters." (Gov. Ex. B, R. 137.) He stated that Mr. Knapp was of the opinion that the lease "will tend towards safeguarding the freight divisions, now being allowed the C., L. S. & E. Ry. by its connecting lines against a reduction of such divisions under some possible application of the Interstate Commerce Laws," and that these divisions "constitute a large part of the earn[illegible] the C., L. S. & E., and of course should be safeguarded to the furtherest extent." (Gov. Ex. B, R. 137–138.) Mr. Knapp, he wrote, would submit for Judge Gary's "consideration a definite plan for carrying out the suggestion" (Gov. Ex. B, R. 138).

On January 3, 1906, Judge Gary wrote to Mr. Banks suggesting that he have a form of lease drawn and sent to Judge Gary for consideration. (Gov. Ex. B, R. 138.)

Judge Gary had apparently asked Mr. Filbert, Comptroller of the Steel Corporation, to submit his views on the proposed lease, for on October 15, 1907, he wrote to Judge Gary outlining in detail a number of questions respecting the advantages to be derived from the lease and the manner in which it would affect the Illinois Steel Company. (Gov. Ex.

B, R. 139–141.) He also made specific suggestions concerning certain provisions in the lease dealing, among other things, with the amount of rental and with the charges which should be made as between the two roads, for improvements and extensions. (Gov. Ex. B, R. 140–141.)

Mr. Banks wrote to Judge Gary on December 3, 1907, giving an elaborate reply to the questions raised by Mr. Filbert. (Gov. Ex. B, R. 141–146.) He discussed again the danger which would confront the Lake Shore, if it remained a separate property, of being deprived of its divisions upon the theory that it was a terminal road handling only the freight business of the Illinois Steel Company, and he outlined the arguments which appellee could make to defend its claim to such divisions if the lease were made. (Gov. Ex. B, R. 141–143.) He felt that it was "only a question of a short time" before the connections of the Lake Shore would urge to the Interstate Commerce Commission that the Lake Shore be given only a switching rate instead of divisions. (Gov. Ex. B, R. 143.) He wrote: "If that is done, *it will mean a very great loss to the Corporation.*" (*Ibid.*) His discussion of how the Illinois Steel Company would be affected by the lease as respects manufacturing and transportation costs (Gov. Ex. B, R. 143–145) strikingly illustrates the many ways in which the interests of the Illinois Steel Company, as a ship-

per, were irresistibly drawn into the consideration of the proposed lease.[29] Mr. Banks also discussed the terms of the lease and expressed his agreement with certain modifications which Mr. Filbert had suggested. (Gov. Ex. B, R. 145–146.) The lease was finally executed as of June 1, 1909. (Gov. Ex. X, R. 365–376.)

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[29] Note particularly the following:

"I believe that we could make a less rate on iron ore from South Chicago to Joliet than we now have, and could do that by agreement with other Railroads who handle no iron ore. As to reduced rates on other commodities, I do not believe we could make any reduction, for the reason we must charge the same rates between South Chicago and Joliet as the Chicago & Alton, Santa Fe, and Rock Island are charging between Chicago and Joliet. *The Steel Corporation must not, by its own road, put in rates for its own constituent companies that serve to reduce the rates of other Railroads on shipments made by its patrons and competitors of the Steel Company.* In other words, we must assist our competing railroads to get reasonable compensation for their service from outside parties, and to do this, we must charge reasonable rates for handling the business of our constituent companies." [Italics supplied.] (Gov. Ex. B, R. 145.)

Mr. Filbert replied on December 28, 1907:

"It is unfortunate you cannot see your way clear to make lower rates between South and Joliet on commodities other than ore. Still, as long as the Steel Company would, under the new deal, be giving up as a manufacturing proposition the benefit which accrues to it in other directions, and which in amount is largely in excess of the South-Joliet business, I suppose the loss of this latter would not be large, comparatively. *After all the crux of the matter, in my mind, is in the first problem you touch on. 'What advantages would accrue from the standpoint of traffic relations with connecting trunk lines.'* And that is too deep and complex a question for me to grasp." [Italics supplied.] (Gov. Ex. B, R. 147.)

Appellee soon discovered that the rental [30] which it was required to pay under the lease worked "a great hardship" upon it. (Gov. Ex. B, R. 147–148.) Mr. Banks wrote to Mr. Filbert on September 18, 1912, complaining that the burden upon appellee was so great as to preclude it "from earning much if anything for additions and improvements," since before it "gets anything for additions and improvements, it must earn at least $1,630,000.00 over and above the bond charges of the E., J. & E. and the C., L. S. & E. Roads, and then for every $100,000.00 it earns in excess of this $1,630,000.00, it receives only $35,000.00." (Gov. Ex. B, R. 148.) He stated: "I will admit that under the common ownership of the stock of these railroads, * * * it is immaterial through what channels the earnings of the railroad property should arrive in the treasury of the United States Steel Corporation." (Gov. Ex. B, R. 149.) Nevertheless, he felt that the burden upon appellee

[30] Under the lease appellee was obligated, after paying a 4% dividend ($400,000.00) on its stock, to pay to the Lake Shore: (1) $600,000.00; (2) an amount equal to 7% ($630,000.00) on the Lake Shore capital stock, both of these obligations being cumulative, i. e., payable in succeeding years if not paid in any year; and (3) 18/28 of the remainder of appellee's surplus earnings. (Gov. Ex. X, R. 369–370, 375–376; Gov. Ex. B, R. 147–148, 152–153.) Mr. Banks stated that the lease "to all intents and purposes limits the earnings of the E., J. & E. Road to 4% upon its capital stock", whereas for a number of years prior to the lease appellee "showed its ability to earn its fixed charges and more than 4% on its capital stock." (Gov. Ex. B, R. 148.)

should be lessened, and he proposed certain amendments to the lease, requesting Mr. Filbert "to give the matter your careful consideration so that when Judge Gary returns home you and I can take the matter up with him to see if it meets with his approval." (Gov. Ex. B, R. 149–150.)

Mr. Filbert suggested that Mr. Banks first take the matter up with Mr. Buffington, president of the Illinois Steel Company, so as to be able to present to Judge Gary "a joint recommendation" which, he felt, "would greatly facilitate *a decision on Judge Gary's part.*" (Gov. Ex. B, R. 150.) Mr. Banks again wrote to Mr. Filbert on January 22, 1914: "I would like to get this matter settled. The present lease is such a burden upon the E., J. & E. Road that I feel it extremely unfair, and I feel sure that Judge Gary does not want either one of the properties to have anything that isn't fair." (Gov. Ex. B, R. 150–151.) Mr. Filbert replied that he would prepare certain figures for presentation to Judge Gary and stated that he presumed that Judge Gary "*before finally rendering a decision*" would hold a conference with Mr. Banks and Mr. Buffington. (Gov. Ex. B, R. 151.)

Mr. Banks submitted to Mr. Filbert on June 9, 1914, an elaborate analysis of the disposition of appellee's earnings since the date of the lease, showing the disproportionate amount of earnings paid to the Lake Shore as compared with those retained by appellee. (Gov. Ex. B, R. 152–154.) In the

course of demonstrating that this was unfair because it did not permit appellee "to make any improvements, additions, or betterments to its property out of its earnings," he pointed out that appellee has about 140 miles of track to maintain within the Gary Plant of the Illinois Steel Company, costing more per mile to maintain than appellee's main line, and that although the Illinois Steel Company contributes nothing to their maintenance, many of such tracks are used exclusively [31] by the engines of the Illinois Steel Company which "operates as many or more switch engines within the Gary Plant" than appellee. (Gov. Ex. B, R.

[31] Contrast with this, appellee's practice with respect to industrial tracks maintained for independent shippers. While appellee will furnish tracks for industrial purposes to any industry located on its line where in its opinion "the business of the industry will warrant the construction and maintenance of those tracks" (R. 91), appellee retains for itself the exclusive use of such tracks for any purpose. (R. 76, 91.) A vice president of appellee testified that it was still true that the Illinois Steel Company uses the tracks maintained by appellee, though "not necessarily exclusively." (R. 94.)

Appellee has approximately 270 miles of industrial tracks serving the Illinois Steel Company plants at Joliet, Gary and South Chicago, nearly all of which are located off the appellee's property (Gov. Ex. O, p. 1) and within the plants of the Illinois Steel Company (Def. Ex. 21, R. 412). The average annual cost to appellee of maintaining these tracks is approximately $540,000.00. (Gov. Ex. O, p. 1.) The mileage of industrial tracks serving industrial plants not affiliated with the United States Steel Corporation is by comparison negligible. (Gov. Ex. O, p. 1; Def. Ex. 21, R. 412.)

153.)[32] Mr. Banks made certain suggestions for modifying the rental provisions of the lease and stated that he would be glad to have Mr. Filbert use the letter if it would help him "to formulate a plan to be laid before Judge Gary." (Gov. Ex. B, R. 154.)

After a conference between Judge Gary, Mr. Banks and Mr. Buffington, certain modifications[33]

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[32] Note also the following statements in this letter:

"We have a thousand coke cars that cost us about $150,000 last year for steel plates to make them suitable for carrying the by-products coke. These cars were originally latticed steel cars and had to be made solid bodies so as to prevent the wasting of the coke. The revenue received by the railroad for the handling of this coke does not compensate it for its investment and the service it performs.

"When there is slack business in the Steel Company's plant, we cannot reduce our operating expenses in proportion to the reduction of the plant. As an illustration—At Joliet there are four blast furnaces. The Steel Company can close down one furnace or 25% of their capacity and yet we cannot withdraw a single man or a single engine on account of the same. We have less work for our engines to do but the other three blast furnaces must be taken care of and therefore our expenses are not reduced. They can make a further reduction by taking out another blast furnace, thus reducing their capacity 50% and still we will not be able to take off a single man or an engine engaged in serving their furnaces." (Gov. Ex. B, R. 153–154.)

[33] These modifications were considerably less favorable to appellee than those which Mr. Banks had suggested. (Compare Gov. Ex. B, R. 155, with Gov. Ex. B, R. 154.) Mr. Banks was not satisfied and on December 6, 1917, again complained to Mr. Filbert of the inequities of the rental provisions. (Gov. Ex. B, R. 156–157.) He pointed out that appellee "has been compelled (because it was good business and *for the interest of the Corporation* to do so)" to expend large

were agreed to and Judge Gary requested that after the draft of the modifications was prepared it should be submitted to the Steel Corporation for review before it was executed. (Gov. Ex. B, R. 155–156.) Thereafter, an amendment was executed, as of December 1, 1913. (Gov. Ex. X2, R. 376–383.)

Two minor contentions made by appellee with respect to this lease may be briefly noted. Appellee relied upon testimony by Mr. Banks that his purpose in urging the lease was the possible economies to be derived by operating the two roads as one. (R. 29, 42.) If this fact is at all material, it is sufficient to point out that the documentary evidence clearly does not bear out Mr. Banks' testimony. That the dominant purpose for making the

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sums for shops and other facilities at Joliet, which facilities would be much larger than necessary for appellee's power and equipment, should appellee ever be separated from the Lake Shore; that appellee has had to carry the burden of both roads when the steel business, and consequently also traffic over the Lake Shore, was poor; and that a "further reason for giving the E., J. & E. a better division of surplus earnings is to avoid the payment of excess taxes on the part of the Corporation," since the profits of the Lake Shore swell "the already large earnings of the Illinois Steel Co." so that it pays " a greater percentage of Income Tax," whereas an increase in the earnings of appellee "would not call for as high a rate of taxation." (Gov. Ex. B, R. 156–157.) He felt, therefore, that "the best interest of the Corporation would be conserved by granting" a more equitable division of appellee's surplus earnings. (Gov. Ex. B, R. 156.)

The amendment of December 21, 1917 (Gov. Ex. X3, R. 384–388) did not eliminate the rental provisions of which Mr. Banks complained in the foregoing letter.

lease was to prevent the loss of divisions is apparent throughout all of the documentary evidence.[34] The other contention made by appellee was that the documentary evidence discloses that Judge Gary was at first opposed to making the lease. (Gov. Ex. B, R. 135, 138.) It is difficult to understand what comfort appellee derives from that fact. That the lease could not be made until Judge Gary's approval was obtained only serves to demonstrate the dominant part played by the officials of the Steel Corporation in the decision upon this important railroad matter.

10. Conclusion

The Government does not wish to burden the Court with a summary of the foregoing analysis of the evidence. This analysis is itself only a summary of what the record discloses.

It is, of course, recognized that it is normal, usual and desirable for a stockholder to keep informed

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[34] The first place in the documentary evidence at which the possible advantages of the lease from an operating point of view is mentioned, is in Mr. Filbert's letter of October 15, 1907 to Judge Gary. (Gov. Ex. B, R. 139.) It is merely one of the numerous items listed by Mr. Filbert for consideration. Mr. Bank's lengthy reply of December 3, 1907 (Gov. Ex. B, R. 141–146) devotes one short paragraph to this matter (Gov. Ex. B, R. 143). Mr. Filbert in his letter of December 28, 1907 to Mr. Banks stated, "After all the crux of the matter, in my mind, is in the first problem you touch on. 'What advantages would accrue from the standpoint of traffic relations with connecting trunk lines.'" (Gov. Ex. B, R. 146–147.)

of the affairs of a corporation. It is also recognized that some of the practices shown by the record are not, *when considered alone,* necessarily indicative of the exercise by the Steel Corporation of control over the affairs of its subsidiaries. But, as previously stated, the Government does not rely upon any particular fact considered alone, but rather upon all of the evidence in the record and upon each fact considered in the light of all other facts.

One point should be made clear. If a stockholder desires to participate in the affairs of a corporation in a manner usual and normal, he may ask that certain information be furnished or that certain kinds of reports be forwarded to him. If that stockholder desires to supervise, direct and control the affairs of that corporation he will, of course, obtain all of that information, all of those reports, and *he will do more.* The fact that the stockholder in the latter case may be obtaining information which it is also normal and usual for stockholders to obtain, should not be permitted to obscure the issue as to whether upon a consideration of *everything* done by the stockholder, the inference is compelled that the "ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company." (*United States* v. *Reading Co., supra,* pp. 62–63.)

Certainly the facts in this case are far stronger than those upon which the Reading Railway was held by this Court in the *Reading* case to be a mere agent or instrumentality of the Reading Company. (*Supra*, pp. 26–35.) Indeed, it is difficult to conceive of a case in which the evidence in support of that proposition would be as compelling as that in the present record.

To mention some of the practices: it is clearly not "normal and usual" for a stockholder to decide what expenditures for improvements shall be made by the corporation; nor to obtain control of the surplus funds of the corporation; nor to control the clearing of transactions between various corporations in which the stockholder owns stock; nor to obtain daily or weekly reports of the bank balances of such corporations, or weekly reports of purchases, or reports of all capital expenditures; nor to obtain the filing by such corporations of contracts and bids, or the making of "budget estimates"; nor to "recommend" the amount of dividends to be declared; nor to hold periodical meetings of the presidents of such corporations. To be sure, these are methods which the stockholder may find it necessary to adopt in order effectively and efficiently to supervise and direct the affairs of such corporation, but surely they are not for that reason any the less proof that such supervision and direction are in fact practiced.

III

THERE IS NOTHING IN (A) THE CHARACTER OF THE TRANSPORTATION SERVICE WHICH APPELLEE PERFORMS FOR THE PRODUCING SUBSIDIARIES OF THE UNITED STATES STEEL CORPORATION OR (B) THE MANNER IN WHICH APPELLEE'S AFFILIATION WITH SUCH SUBSIDIARIES EXISTS, I. E., THROUGH THE COMBINATION OF THEIR STOCK IN A HOLDING COMPANY, WHICH PREVENTS THE COMMODITIES CLAUSE FROM BEING APPLICABLE TO THE TRANSPORTATION OF THE COMMODITIES IN QUESTION

Appellee contended below that for some reason the Commodities Clause does not apply at all to the transportation by appellee of the commodities owned by the producing subsidiaries. This contention was presumably made even on the assumption that the Steel Corporation in practice administers the affairs of appellee and of the producing subsidiaries as mere agents, instrumentalities, or departments of one industrial organization. Indeed, as will presently appear, the contention would seem, at least in part, to be predicated upon the premise that the appellee is but a transportation facility of the United States Steel Corporation, and to that extent the contention directly contradicts appellee's assertion that it is an independently operated common carrier not subject to the domination or supervision of the United States Steel Corporation.

The Government has been at great pains to understand precisely what the contention is. Appellee complained in the court below that the Government misunderstood or misstated its conten-

tion. As a major portion of appellee's brief below was devoted to this contention, and as it will doubtless constitute one of the principal arguments of appellee in this Court, the Government deems it essential to attempt to state the contention and to endeavor to answer it.

So far as the Government has been able to ascertain, the contention appears to proceed upon two different notions. There is the thought, first, that because appellee transports a considerable volume of freight between different plants of the subsidiaries of the Steel Corporation and between such plants and the lines of connecting carriers, the Commodities Clause is inapplicable to such transportation. And there is the further thought that a railroad which is a subsidiary of a producing company or of a holding company cannot, as a matter of law, be held to have an interest within the Commodities Clause in commodities owned by the producing company or by producing subsidiaries of the holding company. It is urged that this kind of affiliation between a railroad and a producing company is to be carefully distinguished from an affiliation existing by virtue of the ownership by a railroad of the stock of a producing company. Appellee's argument appears to be based either on each of these notions separately or on both in combination. The Government contends that each of these contentions is without foundation and is based upon an erroneous conception of

the provisions and purposes of the Commodities Clause.[35]

A. AS TO THE CHARACTER OF THE TRANSPORTATION SERVICE WHICH APPELLEE PERFORMS FOR THE STEEL CORPORATION SUBSIDIARIES

In its answer appellee alleged (R. 23) that "it is and was at all times mentioned in said amended petition an industrial railroad whose principal service is performed for the subsidiaries of the United States Steel Corporation and consists in the main of intraplant and interplant and interchange and terminal service" and that "it performs an intermediate or interline service between trunk line carriers with which it connects, an interchange serv-

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[35] The *opinion* of the court below apparently rejects in its entirety this contention of appellee. It states, after discussing the decisions of this Court (R. 598):

> Irrespective of form, if the facts in a given case show that a railroad company occupies the inconsistent position of carrier and shipper, then the railroad company is violating the Commodities Clause. The question is one of fact. * * *

But, in the conclusions of law requested by appellee and adopted and signed by the court (R. 499) it is stated (R. 498), that on the facts found appellee "as a matter of law is not guilty of violating" the Commodities Clause, and that (R. 499):

> The transportation in interstate commerce by a railroad corporation whose stock is owned by an industrial corporation, of commodities produced or owned by such industrial corporation, is not a violation of said Commodities Clause of said Interstate Commerce Act, but is sanctioned by, and subject to regulation under Section 15 (13) of said Interstate Commerce Act.

ice between such carriers and industries on its line other than the subsidiaries of the United States Steel Corporation, and a relatively minor amount of local service for the general public."

In its brief below, appellee stated (p. 61):

> The line of the Elgin, Joliet, and Eastern Railway Company connects the plants of the Illinois Steel Company with the plants of the other named subsidiaries. It also connects all of these plants with all of the trunk lines entering the City of Chicago. These facts demonstrate the legitimate economic purpose of the Steel Corporation in acquiring the railroad. The use of it made it an industrial railroad within the definition of the Interstate Commerce Commission in its report made to Congress in 1910, four years after the passage of the Hepburn Act, irrespective of whether it was such prior to its acquisition. (See 24th Annual Report of Interstate Commerce Commission, page 33.)

This would seem to suggest that appellee contends that it is a so-called "industrial railroad" and that such railroads are beyond the scope of the Commodities Clause. But at another place in its brief appellee stated (p. 13):

> It is not Defendant's position that the Commodities Clause does not apply to any "industrial railroad", that Defendant is an "industrial railroad", and that therefore the Commodities Clause does not apply to Defendant.

* * * * *

> Undoubtedly very few "industrial railroads" come within the Commodities Clause but the Clause does not use the words "industrial railroad" and does not make the definition of an "industrial railroad" the dividing line between the railroads which are included and those which are excluded.

It is difficult to conceive upon what basis appellee could possibly contend that it is or bears any resemblance to, a so-called industrial railroad. The Interstate Commerce Act does not use the words "industrial railroad", and the term does not appear to have any legal significance, but the Commission has described what it deems to be an "industrial railroad" as follows:

> An industrial railway may be defined as an incorporated or unincorporated railway controlled by some manufacturing or mining industry, the major portion of whose traffic is furnished by the controlling company. *Such a road is distinguished from a commercial road in that it is not primarily for the sale of transportation;* it is distinguished from a purely private track or siding in that the operation of its property gives rise to a service to which some definite payment or allowance may be assigned. (24th Annual Report of Interstate Commerce Commission, p. 33.) [Italics supplied.]

Appellee is obviously a "commercial road" operated "primarily for the sale of transportation." The facts in the record (see *supra,* pp. 4–8) con-

cerning the physical extent and characteristics of appellee's line, its incorporation, its tonnage, and the general common carrier service rendered to numerous shippers located upon and served by it, make it clear that appellee does not fall within any concept of the term "industrial railroad." Appellee's operations commenced in 1884. (*Supra,* p. 5.) Its stock was owned by the general public until 1898 or 1899, when it was acquired by the Federal Steel Company, and appellee became one of the subsidiaries of the United States Steel Corporation upon the formation of that corporation in 1901. (*Supra,* p. 5.) Appellee's line bears no resemblance to a short line railroad or a terminal railroad connecting the plants of an industrial corporation with trunk lines. Appellee forms an extended arc around the City of *Chicago in the* course of which it connects with every railroad entering that City, thereby providing an expeditious means of moving freight from the East to the West and *vice versa.* (*Supra,* p. 4.) This peculiarly strategic location, which is the outstanding characteristic of appellee's line and is the principal basis upon which it solicits business from shippers, was a characteristic of appellee's road before the formation of the Steel Corporation, and derives solely from appellee's geographic position and not in any way from the fact that the Steel Corporation owns its stock.

Until 1909 appellee received 75 per cent of its business from the general public and only 25 per

cent from the Steel Corporation subsidiaries, and, indeed, over one half of this 25 per cent was business received by appellee prior to the formation of the Steel Corporation. (*Supra*, pp. 5–6.) Appellee owes its increased volume of Steel Corporation traffic to the lease in 1909 of the Lake Shore road. (*Supra*, p. 6.) It has previously been pointed out that the Lake Shore served "practically one industry, the Illinois Steel Company", with a short haul of about eleven miles to connecting carriers; that it was feared that the Lake Shore would, because of the character of its service, be held to be a terminal or "industrial railroad" and, as such, entitled only to a switching fee, instead of divisions of joint through rates; that it was felt that, if the Lake Shore's business was merged with that of appellee, *which derived 75 per cent of its traffic* from the general public and was admittedly a common carrier, the danger of losing the divisions would be averted because such divisions would then be received by appellee, and the common carrier characteristics of the merged lines would be so obvious as to negative any suggestion that the divisions were being received by a terminal or "industrial railroad"; and that it was for the purpose of obliterating the terminal or "industrial railroad" characteristics of the Lake Shore road that it was decided to lease that road to appellee. (*Supra*, pp. 85–94.) In view of this chapter in the history of appellee and of the Steel Corporation, it is not surprising that appellee advances only diffidently the

suggestion that it is, or bears resemblance to, a terminal or "industrial railroad."

Appellee is clearly a commercial common carrier railroad. Its president testified (R. 120) that "it has no other business except transportation." It has a complete organization of railroad officials, operates 280 freight engines (it does no passenger business), 12,000 freight cars, employs about 7,000 persons, and has two operating divisions, the Joliet division and the Gary division (R. 36). It is a party to about 2,000 tariffs as initial or delivering line, and to a great many tariffs as an intermediate line (R. 90). It is a member of the Illinois Freight Committee and the Central Freight Association (R. 86). It has freight solicitors in Central Freight Association territory, in Illinois and the Southwest, another in the Northwest, and still another in Seattle and the Pacific Coast territory, who solicit freight in those localities to be routed over appellee's line (R. 89).

Appellee is no more a terminal or "industrial railroad" than would be the Pennsylvania Railroad, should the United States Steel Corporation acquire its capital stock.

Nor is there basis for any suggestion that whether a railroad is violating the Commodities Clause depends upon the character of the service which that railroad performs for an affiliated industry. Of course, apart from a case in which a railroad owns the commodities transported, the usual case under the Commodities Clause would

be one in which, as here, the railroad transports the commodities of an industrial corporation with which it is affiliated, and the amount of such traffic might be large or it might be small. The Commodities Clause applies to any common carrier railroad company. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 417–418. Appellee is a common carrier railroad company, is subject to the Commodities Clause, and therefore may not transport commodities which it owns or in which it has an interest, direct or indirect. While the Commodities Clause exempts no railroad companies, it does exempt two classes of commodities: (1) timber and timber products and (2) commodities necessary and intended for use by the railroad for common carrier purposes. Appellees in substance would add another exempted class of commodities, namely, commodities as to which a railroad company renders transportation service of the kind which appellee performs for the subsidiaries of the Steel Corporation. The Government is unable to perceive how such transportation service can be said to be different from the transportation service performed by any common carrier railroad or from the transportation performed for affiliated industrial corporations by the railroads involved in the Commodities Clause cases which have come before this Court.

A similar contention was made by the Delaware & Hudson Company in *United States* v. *Delaware & Hudson Co., supra.* Counsel for that company

contended that its primary business was the production of coal and that it operated a railroad merely as an incident to its industrial functions, and counsel urged [36] (pp. 387–388):

> Clearly the term "railroad company" as used in the commodity clause does not apply to every corporation which operates a railroad. There are numerous industries throughout the country which operate, as incidental to their business, more or less railroad mileage. As to such mileage these corporations may be charged with the duties of a common carrier, and as business may be handled on through bills of lading such corporations would be, with respect to such matters, carriers subject to the act to regulate commerce: Yet such corporations could not, in any just sense, be regarded as railroad companies within the meaning of the commodity clause. In this class the Delaware and Hudson Company is included. The legislative history of this company shows that it is a coal company with incidental railroad functions. Unless, therefore, the expression "railroad company" in the commodity clause is to be taken as meaning every corporation of an industrial character which merely as an incident to its industrial functions operates a railroad, then the clause should not apply to this appellee.

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[36] Note the similarity of appellee's allegations in its answer (R. 23–25) to the contentions of counsel for the Delaware & Hudson Company and to the allegations of the answer of that company (213 U. S. 336, 393–395 f. n.).

> It is perfectly legitimate for an industrial corporation to promote the efficiency and economy of its operations by the construction of railroads when legally empowered to do so. It would be a superlative injustice to treat an industrial corporation as a railroad company because of the operation of a railroad under such circumstances, and then, because the industrial corporation is so treated as a railroad company, to prohibit the industrial corporation from performing the very transportation functions which alone serve as the inducement to the operation of the railroad.

This Court rejected this contention, stating (pp. 417–418):

> There is a contention as to one of the defendants, the Delaware and Hudson Company, to which we, at the outset, referred, which requires to be particularly noticed. Under the charters granted to the company by the States of New York and Pennsylvania it was authorized to secure coal lands and mine coal, and, without going into detail, was originally authorized to construct a canal, and, ultimately, a railroad for the purpose of transporting, for its own account, the products of its mines, and, undoubtedly, vast sums of money have been invested in carrying out these purposes. It is true also that the company is the owner of stock in various coal corporations. The claim now to be disposed of is that by the true construction of its charters the Delaware and Hud-

son Company is not a railroad company within the meaning of the term as used in the commodities clause, but is really a coal company. The contention, we think, is without merit. *The facts stated in the excerpts from the answer and returns of the company, which we have previously placed in the margin, leave no doubt that the corporation was engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, and as such we think it was a railroad company within the purview of the clause and subject to the regulations which are embodied therein as we have interpreted them.* [Italics supplied.]

B. AS TO THE MANNER OF APPELLEE'S AFFILIATION WITH THE PRODUCING SUBSIDIARIES

As previously indicated, appellee's contention in this respect appears to be that appellee cannot, as a matter of law, be held to have an interest, direct or indirect, in the commodities of the producing subsidiaries. The argument appears to be that a railroad company may have an interest within the Commodities Clause in the commodities owned by a producing company, where the railroad company owns the stock of the producing company, but may not have such an interest where the stock of both the railroad and the producing company is owned by a holding company. Under appellee's view all that was necessary, apparently, for the railroads involved in the Commodities Clause cases which

have come before this Court, to escape the condemnation of that statute was to reorganize their corporate structure so that the stock of the railroad company and the producing company would be held by a holding company. The *Reading* case (*supra*, pp. 25–35), is squarely against appellee's contention, for there a holding company held the stock of the railroad and of the producing company and this Court expressly held that the railroad subsidiary had an interest within the Commodities Clause in the commodities owned by the producing subsidiary.

The contention is based upon a misconception of the provisions and purposes of the Commodities Clause. The Commodities Clause does not prohibit ownership by a railroad company of the stock of a producing company; or ownership by a producing company of the stock of a railroad company; or ownership by a holding company of the stock of a railroad company and of a producing company; or common ownership by individuals of the stock of a railroad company and a producing company. The Commodities Clause is not a prohibition against stock ownership at all. It prohibits transportation of commodities under certain circumstances. The effect of the decree in a suit in a Commodities Clause case is simply to enjoin the transportation of such commodities.

The Commodities Clause is a simple statute, stated in broad terms to achieve a broad legislative policy. As indicated, it exempts two classes of com-

modities, but with these exceptions it prohibits in sweeping terms the transportation by a common carrier railroad company of any commodities of any description which the railroad owns or in which it has "any interest, direct or indirect." The statute does not specify what constitutes an "interest, direct or indirect." It does not make "interest, direct or indirect" turn upon stock ownership. It does not mention stock or stock ownership at all.

Whether a railroad has an "interest, direct or indirect" in commodities is to be determined upon the basis of the relationship between the railroad and the owner of the commodities, considered in the light of the purpose of the Commodities Clause "to prevent railroads from occupying the dual and inconsistent positions of public carrier and private shipper" and "to separate the business of transportation from the business of selling." *United States* v. *Del., Lack. & West. R. R.*, 238 U. S. 516, 525. This was precisely the approach of this Court in the *Reading case.* (*Supra,* p. 29.)

The decisions of this Court make it clear that stock ownership is not significant in and of itself in determining whether the forbidden interest exists. In *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, *supra,* the Court held that mere ownership by a railroad of the stock of a producing company was not sufficient to establish an interest on the part of the railroad in the commodities of the producing company. In *United States* v. *Lehigh*

Valley R. R. Co., 220 U. S. 257, the Court held that where, however, the ownership of the stock was resorted to for the purpose of making the producing company an agent, instrumentality, or department of the railroad company, the railroad had such an interest in the commodities, and this ruling has been reaffirmed in subsequent cases, including the holding in the *Reading* case, *supra*, with respect to the Central Railroad Company. These cases do not turn upon stock ownership as such but upon the factual relationship of the railroad company to the owner of the commodities. In *United States* v. *Del., Lack. & West. R. R.*, 238 U. S. 516, 526–527, *supra*, it was stated that common ownership by individuals of a substantial portion of the stock of a railroad company and of a producing company would not in and of itself create the requisite interest in the commodities of the producing company. In that case, as in *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255, the forbidden interest was found to exist not as a result of stock ownership but by reason of a contract governing the sale of the commodities in question.

In the *Reading* case, *supra*, this Court's holding that the Reading Railway violated the Commodities Clause in transporting the commodities of the Reading Coal Company was based, in the Government's view, not upon the fact of stock ownership as such, but upon the peculiar nature of a holding company, the very purpose and function

of which is to reduce its subsidiaries to its mere agents, departments or instrumentalities. In that case, it is submitted, this Court recognized that ownership by a holding company of the stock of a subsidiary railroad and of subsidiary producing companies was not substantially different from direct ownership by one corporation of title to both the railroad and the producing properties. Whether the Government is correct in its interpretation of the *Reading* case, it is in any event clear that that case stands squarely for the proposition that a subsidiary railroad, such as appellee, may have an interest within the meaning of the Commodities Clause in commodities owned by producing subsidiaries of a holding company.

Indeed, it must be obvious that the decisions of this Court do not mark out the limits of "interest, direct or indirect", within the meaning of the Commodities Clause.[37] The decisions do indicate certain situations in which the forbidden interest exists. There may be other situations, similar to or wholly unlike those in the decided cases, in which a railroad company may have the forbidden interest in commodities transported by it.

Appellee has endeavored to create the impression that dire consequences would follow a decision

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[37] In its brief below appellee stated (p. 30): It [*United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257] sets the limits beyond which the Commodities Clause cannot be carried.

in favor of the Government in this case. Appellee introduced in evidence a list of terminal railroads affiliated with an industrial or mining corporation which is stated to be the principal shipper over the railroad in question (Def. Ex. 34, R. 417–425). It is to be noted that this is denominated a list of terminal railroads. As previously indicated, appellee neither is nor resembles a terminal road. But, apart from that consideration, it is plain from what has been stated that a decision in this case will not involve a holding either that it is unlawful for industrial corporations to own the stock of such railroads or that it is unlawful for a railroad to transport the commodities of a producing corporation which owns its stock. The present case is one of a holding company and a decision favorable to the Government will certainly not affect the transportation of commodities by any railroad which does not bear the same relationship as does appellee to a holding company and to producing subsidiaries of that holding company. In the case of a common carrier railroad company whose stock is owned by a producing company, mere stock ownership would not create the forbidden interest in the commodities of the producing company. Whether the transportation of such commodities would in such a case constitute a violation of the Commodities Clause would depend upon the particular facts there presented. If, upon such facts, it appears that the railroad is independently oper-

ated, that it functions as a common carrier without reflecting in its operations "the dual and inconsistent positions of public carrier and private shipper" or, in other words, that there is in fact a separation of "the business of transportation from the business of selling" (*United States* v. *Del., Lack. & West. R. R.*, 238 U. S. 516, 525), the transportation of the commodities would not be in violation of the Commodities Clause. Surely, that is not too great a burden for a railroad company to assume when it undertakes to serve the public as a common carrier.

The Government searched in vain in appellee's brief below for any assertion that the evils designed to be prevented by the Clause are any the less present where a railroad and a producing company are agents or instrumentalities of a holding company than where a producing company is an agent or instrumentality of a railroad company or where one corporation holds title directly to a railroad and producing properties. In the *Reading* case, *supra* (p. 29), this Court expressly stated that transportation by the Reading Railway Company of the commodities of the Reading Coal Company, both being subsidiaries of a holding company, was "clearly within the evil to be remedied" by the Commodities Clause (253 U. S. 26, 61).

Appellee relied upon many collateral matters in support of its contention that the Commodities Clause was not applicable to the transportation by

it of the commodities of the subsidiary producing companies. While the Government submits that what has already been stated is sufficient to dispose of this contention, it is believed that it will be helpful to the Court if these matters are briefly explained.

(1) *Section 15 (13) of the Interstate Commerce Act*

Appellee's reliance on Section 15 (13) of the Interstate Commerce Act is the most difficult of appellee's contentions for the Government to understand. This section reads as follows:

> If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. (Act of June 29, 1906, c. 3591, 34 Stat. 584, 590, as amended by Act of June 18, 1910, c. 309, 36 Stat. 539, 553–554; U. S. C., Title 49, Sec. 15 (13).)

Appellee's contention apparently is that it would be inconsistent with Section 15 (13) of the Act to hold that the Commodities Clause is applicable to the transportation by appellee of the commodities of the producing subsidiaries. Without going into the confusing ramifications of the argument which appellee bases upon this Section, the Government presents a brief statement of the origin of this Section and the function which it performs as part of the statutory system for the regulation of the railroads.

Section 15 (13) was enacted in 1906 as part of the Hepburn Act. In its Annual Report for 1905 (19th Ann. Rep. I. C. C., Dec. 14, 1905) the Commission reprinted, as an appendix, a draft of a bill embodying recommendations for amendments to the Act to Regulate Commerce, which the Commission had submitted to the Senate Committee on Interstate Commerce at the request of that Committee. The Report contained (pp. 5–13) a brief explanation of the amendments recommended. One of such amendments was a provision substantially in the form of Section 15 (13) as enacted in the Hepburn Act [38] (*Ibid,* Appendix E, p. 179).

The purpose of this provision is clearly stated in the Commission's Annual Report for 1905 (p. 10):

> There is an important class of cases, in which the owner of the property performs a

[38] The Commodities Clause was not one of the provisions included in the bill recommended by the Commission (19th Ann. Rep. I. C. C., Dec. 14, 1905, Appendix E).

part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such preference may take the form of an excessive division to a terminal road owned by the shipper; the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another.

In its Annual Reports for 1903 and 1904 the Commission had described certain practices which were being resorted to as devices for preferring shippers by making excessive payments to them for the use of facilities owned by them and used in performing part of the transportation service (17th Ann. Rep. I. C. C., Dec. 15, 1903, pp. 11, 18–26; 18th Ann. Rep. I. C. C., Dec. 19, 1904, pp. 6, 10–23.) The Commission particularly stressed the practice, used by industrial corporations, of incorporating railroad companies to operate intraplant tracks and tracks extending from plants to connecting carriers, the railroad companies then re-

ceiving divisions of joint through rates from such connecting lines on the theory that they were common carriers (17th Ann. Rep. I. C. C., Dec. 15, 1903, pp. 18–22; 18th Ann. Rep. I. C. C., Dec. 19, 1904, pp. 19–23). In referring to this practice the Commission said:

> The terminal road is, in our judgment, one of the most dangerous means for the preferring of favored shippers at the present time, and we earnestly call the attention of Congress to this situation. (18th Ann. Rep. I. C. C., Dec. 19, 1904, p. 19.)

The Commission regarded these roads as "mere switching roads", or roads "existing only on paper", organized as a method by which rebates could be given to shippers without in form departing from the published tariffs (17th Ann. Rep., I. C. C., Dec. 15, 1903, p. 11). One of the roads specifically referred to by the Commisison as falling in this category was the Lake Shore Road (18th Ann. Rep. I. C. C., Dec. 19, 1904, pp. 21–23). Appellee obviously bears no resemblance to such a road.

The Annual Reports of the Commission thus make clear both what the Commission meant in referring to terminal roads and also the function intended for Section 15 (13) of the Interstate Commerce Act. The language of that Section clearly indicates its purpose. It provides in simple language that a carrier shall pay only a just and rea-

sonable allowance to a shipper for any service rendered, or any instrumentality furnished, by such shipper in connection with transportation performed by a carrier, and gives the Commission jurisdiction to determine and fix a reasonable maximum charge to be paid therefor by the carrier. See *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42.

Prior to the decision of this Court in *Tap Line Cases,* 234 U. S. 1, the Commission believed that it could hold that terminal roads were not common carriers with respect to the transportation they performed for the affiliated industry, even though they hauled some non-proprietary traffic for the general public and held themselves out as public carriers. See *The Tap Line Case,* 23 I. C. C. 277, and 23 I. C. C. 549; see *Industrial Railways Case,* 29 I. C. C. 212. Under this view, although the terminal railroads were regarded as common carriers as respects non-proprietary traffic for which they would be entitled to receive divisions of joint through rates, they would not be entitled to such divisions as to the proprietary traffic, but the industrial corporation which owned such a road would, to the extent that the road performed part of the transportation service, be entitled to a shipper's allowance under Section 15 (13). In *Tap Line Cases, supra,* this Court pointed out the error of the Commission in attempting to draw such a distinction between proprietary and non-proprietary

125

traffic. The Court held, in substance, that such a railroad was either a common carrier for all purposes or was not a common carrier for any purpose, and that if it was operated to serve the public it was a common carrier "with rights and obligations as such" and therefore entitled, as any other common carrier railroad, to divisions or allowances out of the joint through rates for all traffic transported by it. See *Tap Line Cases,* 234 U. S. 1, 24–27. The Commission in supplemental reports in *The Tap Line Case,* 31 I. C. C. 490, and in *Industrial Railways Case,* 32 I. C. C. 129, modified its original reports in those cases to conform to the decision of this Court in *Tap Line Cases, supra,* and held that such of the roads as were common carriers under the test applied by this Court in *Tap Line Cases* were entitled to make arrangements with trunk lines for through service under joint rates and to receive a division or a switching charge out of such rates. See *O'Keefe* v. *United States,* 240 U. S. 294.

The obvious distinction between a private industrial line owned by an industrial corporation and used in performing part of the transportation service for which a shipper's allowance may be made under Section 15 (13), and a common carrier which receives compensation in accordance with published tariff rates or divisions thereof is made clear in *Manufacturers Railway Co.* v. *St. L., I.*

M. & S. Ry. Co., 28 I. C. C. 93, [39] in which it was said (pp. 101–102):

> * * * allowances are frequently made by the trunk line to an industry under section 15 of the act for services rendered by an industrial line owned by it or its stockholders, as for an instrumentality furnished by the shipper, * * *. These allowances also are voluntarily made as for services performed by the shipper for the trunk line * * *.
>
> Frequently the industrial line develops new traffic, and shippers other than the owning industry locate on its rails, whereupon the owning industry or its stockholders separately incorporate the railway, which thereupon files tariffs with the Commission, claims thenceforth to be wholly separate and distinct from the owning industry, and thereafter holds itself out to serve the owning industry and its other shippers impartially. Assuming the newly made carrier to be under the law a common carrier in all

[39] For the two other decisions of the Commission in that case see 21 I. C. C. 304, and 32 I. C. C. 100. The order issued was sustained by this Court in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457. At page 482, the Court mentioned, but deemed it unnecessary to discuss, the distinction drawn by the Commission between divisions or switching absorptions made by trunk lines to industrially owned common carriers, and allowances to shippers, citing *Tap Line Cases*, 234 U. S. 1, 28; *United States* v. *Butler County R. R. Co.*, 234 U. S. 29, 35–36; *O'Keefe* v. *United States*, 240 U. S. 294, 302.

> respects such as it represents itself to be, *it is evident that allowances under section 15 of the act can no longer be made to the owning industry as for services rendered by the shipper, as the railway is no longer a part of or in law connected with the latter which is "the owner of property transported," to whom alone, under that section of the statute, allowances may be made,* but is in the contemplation of the act in the same position as it would be if it had been constructed and was being operated by parties having no interest whatever in the owning industry. Conversely the owning industry would be on the same plane as if it had located as an independent shipper upon the newly made railway after the latter's construction by parties having no connection with the industry. The railway is now a public agency which, if it lives up to the obligations attached by the act to its own representations, should collect its charges from the former owning industry the same as it does from other shippers on its line. [Italics supplied.]

Appellee cited a large number of decisions of the Commission presumably in support of the proposition that an allowance or division out of the through rates to a common carrier railroad whose stock is owned by an industrial corporation is regulated by Section 15 (13) of the Act.[40] Appellee's

[40] The cases cited by appellee were: *Finkbine Lumber Co.* v. *Gulf & S. I. R. Co.*, 269 Fed. 933, certiorari denied, 255 U. S. 574; *Texas & P. Ry. Co.* v. *Thompson*,

use of these cases plainly indicates that appellee has confused an allowance under Section 15 (13) which is made to a shipper for transportation services performed by it with its private plant railroad, with a switching allowance or division received by a common carrier out of through rates. These cases make it clear that whenever the Commission finds that an industrially owned railroad is a common carrier it holds that it is entitled to a division or switching allowance out of the line-haul rates. In no such case did the Commission hold that the shipper which owns the stock of such a common carrier railroad, or the railroad itself, is entitled to a shipper's allowance under Section 15 (13) for services rendered by such common carrier. Only when the railroad is not a common carrier but is merely a private facility owned by the shipper does the shipper receive an allowance under Section 15 (13).[41] When such a railroad is a common

288 Fed. 167, 169; *National Malleable Castings Co.* v. *Pittsburgh & L. E. R. R. Co.*, 51 I. C. C. 537, 541 (and cases cited therein); *Jones & Laughlin Steel Co.* v. *P. & L. E. R. R. Co.*, 53 I. C. C. 556; *American Steel & Wire Co.* v. *Newburgh & S. S. Ry. Co.*, 55 I. C. C. 353; *National Tube Co.* v. *Lake Terminal R. R. Co.*, 55 I. C. C. 469; *Lackawanna Steel Co.* v. *S. B. Ry. Co.*, 56 I. C. C. 684; *Jones & Laughlin Steel Co.* v. *Director General*, 60 I. C. C. 325; *Benwood & Wheeling Connecting Ry. Co.* v. *P., C., C. & St. L. R. R. Co.*, 62 I. C. C. 357; *Carnegie Steel Company* v. *Director General*, 80 I. C. C. 269.

[41] Appellee plainly misinterprets the following language in *National Malleable Castings Co.* v. *P. & L. E. R. R. Co.*, 51 I. C. C. 537, 541:

> In numerous cases subsequently decided we have fixed reasonable allowances for switching to and from

carrier it receives compensation for transportation services, as in the case of any common carrier railroad, through its own tariff rates published individually or jointly with connecting carriers. The Commission's power to regulate and prescribe divisions and switching allowances to common carriers out of through rates is conferred by Section 1 (4) and Sections 15 (3) and (6) of the Act, and not by Section 15 (13).[42]

> the tracks of the line-haul carriers performed by the industry itself either directly or through a common-carrier industrial line and in many instances the character of the switching was similar to that performed by the present complainant [citing cases].

A reading of that case and of the decisions cited by the Commission make it clear that the Commission was, in the above language, dealing only with the question whether the particular services performed were transportation services, which it was the duty of the line-haul carriers to perform for the published tariff rates. The Commission held that the services there involved were such transportation services, and that since they were performed by the shipper with its private tracks and locomotives, the shipper was entitled under Section 15 (13) to compensation therefor from the line-haul carriers.

[42] For a complete statement of the history and development of the Commission's jurisdiction to prescribe divisions and switching allowances out of through rates, see *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104; *New England Divisions Case*, 261 U. S. 184; *Morgantown & Kingwood Divisions*, 49 I. C. C. 540.

The cases listed below illustrate the interpretation and application of Section 15 (13) by the Commission and the courts. They demonstrate that the allowances authorized by Section 15 (13) are for shippers only. We have been able to find no case in which the Commission or the courts

To summarize: Section 15 (13) applies only to allowances to shippers. It has nothing to do with the compensation received by common carriers. A common carrier's compensation is derived from published tariff rates or switching allowances or divisions therefrom. The compensation which appellee receives is not an allowance under Section 15 (13) but is, like any other common carrier railroad, its tariff rates published individually or jointly with connecting carriers. For appellee to

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have held that Section 15 (13) authorizes or regulates allowances to an industrially owned or other common carrier. *Sterling & Son Co.* v. *M. C. R. R. Co.*, 21 I. C. C. 451, 454; *Buffalo Union Furnace Co.* v. *L. S. & M. S. Ry. Co.*, 21 I. C. C. 620, 630–631; *A., T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92, 98–100; *Allowances to Elevators by U. P. R. R. Co.*, 12 I. C. C. 85, 89; *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42; *Galveston Export Co.* v. *T. & F. S. Ry. Co.*, 96 I. C. C. 141; *Armour & Co.* v. *E. P. & S. W. Co.*, 52 I. C. C. 240; *Finkbine Lumber Co.* v. *Gulf & S. I. R. Co.*, 269 Fed. 933 (C. C. A. 5th), cert. den. 255 U. S. 574; *National Malleable Castings Co.* v. *P. & L. E. R. R. Co.*, 51 I. C. C. 537; *General Electric Co.* v. *N. Y. C. & H. R. R. R. Co.*, 14 I. C. C. 237; *Solvay Process Co.* v. *D., L. & W. R. R. Co.*, 14 I. C. C. 246; *New York Central & H. R. R. R. Co.* v. *General Electric Co.*, 219 N. Y. 227, 114 N. E. 115, cert. den., 243 U. S. 636; *Merchants Cotton Press & Storage Co.* v. *I. C. R. R. Co.*, 17 I. C. C. 98; *Pneumatic Scales Corporation* v. *A. & R. R. Co.*, 51 I. C. C. 686, 695; *Donner Steel Co.* v. *D., L. & W. R. R. Co.*, 57 I. C. C. 745; *Central R. R. Co. of New Jersey* v *United States*, 229 Fed. 501, 509, cert. den. 241 U. S. 658; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 511; *Allowances for Stacking*, 179 I. C. C. 780, 783; *Mumby Lbr. & Shingle Co.* v. *Chicago, M., St. P. & P. R. Co.*, 200 I. C. C. 261; *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11.

argue that it is inconsistent with Section 15 (13) to apply the Commodities Clause to the transportation by appellee of the commodities of the producing subsidiaries, appellee must contend that Section 15 (13) is applicable to the compensation which it receives for transporting such commodities. In other words, appellee must contend that it is not a common carrier, but is a private facility of the Steel Corporation which, in turn, is entitled to a shipper's allowance under Section 15 (13). This is a far cry from appellee's insistence that it is a common carrier not subject to domination or supervision by the Steel Corporation. Appellee, in short, makes the indefensible assertion that it may escape responsibility under the Commodities Clause upon the basis of another section of the Interstate Commerce Act which, as appellee must be fully aware, is not applicable at all to the transportation service performed by appellee.

The Commission in very clear language has pointed out the error into which appellee has fallen. In *Allowances to Kanawha, Glen Jean & Eastern*, 41 I. C. C. 53, the Commission stated (p. 59):

> The commodities clause forbids common carriers by railroad to transport any articles or commodities, other than timber and the manufactured products thereof and company material, which they own; or in which they have any interest, direct or indirect; or manufactured, mined, or produced by them, or under their authority,

from which they have not genuinely dissociated themselves before the act of transportation. *United States* v. *Delaware & Hudson Co.*, 213 U. S., 366. *The argument frequently is made and is made here that this provision conflicts with the provision of section 15 of the act relative to the compensation of shippers by railroads for assisting them in the service of transportation or for furnishing facilities for such service and that industrial railroads and tap lines are therefore beyond the purview of the commodities clause. The argument is fallacious.* Section 15 recognizes the common-law right of railroads to perform their public duties through agents and by means of hired facilities and merely provides that the Commission may regulate the compensation paid to the agent employed or to the owner of the facility hired if the agent or the owner of the facility is also a shipper. *A., T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.*, 33 I. C. C., 92. [Italics supplied.]

And see *Industrial Railways Case*, 32 I. C. C. 129, 132–133[43]; *Second Industrial Railways Case*, 34

[43] In this case the Commission stated (pp. 132–133): "What we have here said relative to establishment of allowances or divisions with the industrial roads referred to is not to be understood as a finding by us that those industrial roads can resume these relations with the trunk line carriers without transgressing the provisions of the commodities clause. If infractions of that law come to our notice, we shall in the proper way bring them to the attention of the Department of Justice."

I. C. C. 596, 604; *Class Rates from Chestnut Ridge Railway Stations,* 41 I. C. C. 62, 64.

In view of these cases it is difficult to perceive upon what basis appellee contends that the Commission has construed the Commodities Clause as being inapplicable to the transportation by a common carrier railroad company of commodities of an industrial corporation which owns the stock of, or controls, the railroad company. These cases prove directly the opposite. And in *Construction of Line by Jefferson Southwestern,* 86 I. C. C. 796, the Commission expressly applied the Commodities Clause to such a situation in exercising its jurisdiction under Section 1 (18) of the Act. In that case an application was made for a certificate of public convenience and necessity authorizing the construction of fourteen miles of railroad to be used principally for the transportation of commodities of a coal company from mines of that company to connecting trunk lines. It appeared that part of the stock of the applicant was subscribed by stockholders of the coal company, the remaining subscriptions being procured by its president, and that the line had been "projected and promoted in the interests of the coal company" (86 I. C. C. 796, 800). One of the trunk lines opposed the granting of the certificate upon the ground that transportation of the coal company's commodities would be in violation of the Commodities Clause. The Commission recog-

nized that it had no power to enforce the Commodities Clause directly but stated that it "ought not to grant a certificate of public convenience and necessity for the construction of a railroad whose operation, it seems reasonable to believe, may prove to be in violation of that clause" (86 I. C. C. 796, 801–802). It therefore attached a condition to the issuance of the certificate under which the certificate was withheld until valid arrangements were made and approved by the Commission whereby the connecting trunk lines would have the opportunity, within a period of not less than five years, to assume control of the new railroad company by the purchase of its stock or by lease. While the Commission stated that it was not deciding that even with such arrangements the transportation would be lawful, it felt that the question was sufficiently doubtful to justify the granting of the certificate thus conditioned, which it believed would "go far to eliminate in this case the public dangers against which the commodities clause was directed" (86 I. C. C. 796, 803). The Commission stated (p. 801):

> It was because of this commodities clause, undoubtedly, that the promoters of applicant concluded "that it was best to procure subscriptions from persons not stockholders of the coal company." Whether or not they have succeeded in escaping from the clause may be doubted, for its language is very broad and it has been broadly interpreted

by the United States Supreme Court. See *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257; *United States* v. *D., L. & W. R. R. Co.*, 238 U. S. 516; *United States* v. *Reading Company*, 253 U. S., 26; *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255.

This brings us to a consideration of some of the reasons underlying the commodities clause and of the reasons which lead the protestants in this case so strongly to oppose the granting of the desired certificate of public convenience and necessity. In our original report we said, at page 782:

> It is evident that the purpose of the promoters is to benefit from competition between the applicant's proposed connections. The president of the applicant and of the coal company, being asked why he wished to build the line, testified that the more transportation a coal mine has, the better off it is. Undoubtedly advantages would be sought in connection with through rates and divisions, absorption of switching charges, and the supply of cars. Indeed the promoters have already entered into negotiations with the trunk lines for favorable arrangements as to these matters.
>
> Control of or affiliation with a short-line railroad by an industry furnishing a large volume of traffic opens the door to grave abuse, particularly when the short line connects with more than one trunk-line railroad.

> By playing one connection against the other they have frequently been able to gain concessions in divisions, or in car supply, or in other matters, which have, in practical effect, amounted to a preference of, or rebate to, the controlling or affiliated industry. Many such cases have taken our time and attention in the past, and they continually arise. Moreover the connecting trunk lines, because of their competition with each other, often hesitate to bring such cases to our attention, and they have usually been considered either upon our initiative or upon complaint of some industry which is aggrieved by the preference. While the abuse has been limited by our regulation, it is doubtful whether it has been abated. It is not surprising that carriers like the Burlington fear the advent of a short-line industrial railroad in the southern Illinois coal field.

In the court below appellee seemed to rely in some way upon the fact that the Commission has known, as appellee stated it, "of the custom of industrial companies owning the stock of railroad companies serving their plants" and "has never taken any steps to condemn that custom until the beginning of this suit." Of course the Commission has known of that "custom", but, as previously stated, there is nothing in the Commodities Clause declaring it to be unlawful for a producing company to own the stock of a railroad company, as

the Commission has clearly pointed out. See *The Alaska Investigation*, 44 I. C. C. 680, 709; *Adriatic Mining Co.* v. *C. & N. W. Ry. Co.*, 78 I. C. C. 611, 619; *Campbell's Creek Coal Co.* v. *A. A. R. R. Co.*, 29 I. C. C. 682, 692–693. In *The Alaska Investigation, supra,* the Commission stated (p. 709):

> Nor does it appear that the act prohibits the mere ownership by a mining company of the stocks or other securities of a railroad over which its products are shipped. *U. S.* v. *D. & H. Co.*, 213 U. S. 366; *U. S.* v. *L. V. R. R. Co.*, 220 U. S. 257; *U. S.* v. *D., L. & W. Ry. Co.*, 238 U. S. 516; *Campbell's Creek Coal Co.* v. *A. A. R. R. Co.*, 29 I. C. C. 682, 693.

And in *Campbell's Creek Coal Co.* v. *A. A. R. R. Co., supra,* the Commission stated (p. 692):

> It would seem further, that since it is the fact of identity, the commingling of the affairs of the two companies, which causes the prohibited interest, it is immaterial under what form of stock ownership the consequence may have been brought about. This view is not inconsistent with our earlier statements that mere ownership of a railroad by the principal shipper on its line is not prohibited by the act.

(2) Legislative history of the Commodities Clause

Appellee urged below that the legislative history of the Commodities Clause shows that it was not intended by Congress to be applicable to the trans-

portation by appellee of the commodities of the producing subsidiaries. This contention was largely based upon the false premise that Section 15 (13) of the Act regulates the compensation received by a common carrier railroad company for transporting commodities of an industrial corporation which owns the stock of the railroad company. From this false premise it was argued that it would be inconsistent to suppose that Congress intended to prohibit by the Commodities Clause what Congress regulated and, therefore, sanctioned under Section 15 (13). What has been said sufficiently demonstrates the wholly false assumptions upon which this argument is predicated. The argument has other fallacies as well. Even if it be assumed (what is clearly not the case) that Section 15 (13) regulated the compensation received by appellee for the transportation of the commodities of the producing subsidiaries, it does not follow that it would be inconsistent with that section to hold that the Commodities Clause prohibits the transportation of such commodities, if it is found that appellee has an interest, direct or indirect, therein. For by the same token it could be argued that the Commodities Clause does not prohibit anything at all since the Interstate Commerce Act regulates the compensation received by common carriers for all transportation services performed by them and therefore, on appellee's view, necessarily sanctions all transportation under any circumstances.

54316—36——10

Appellee also argued that the debates in Congress demonstrate that the Commodities Clause was not intended to prohibit, under any circumstances, the transportation by an industrially owned railroad of the commodities of the affiliated industrial corporation. But the Commodities Clause by its express terms applies to any common carrier railroad company and to all commodities (other than two exempted classes) in which a railroad company has an interest, direct or indirect. It obviously does not permit of any construction which either would exempt certain common carrier railroad companies or would create additional classes of exempted commodities. Resort to legislative history, under such circumstances, is plainly improper. *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83–84. "Such aids are only admissible to solve doubt and not to create it." *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 588–589. Moreover, debates in Congress may not be resorted to, even in the case of an ambiguous statute. *Duplex Co.* v. *Deering*, 254 U. S. 443, 474; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 318–319.

But since appellee went into the debates at great length in the court below, it is proper at least to point out that the debates not only do not support appellee's contention but prove the opposite. Appellee referred to various passages contained in the following pages of the Congressional Record. 40

Cong. Rec., Pt. 7, 59th Cong. 1st sess., pp. 6455, 6456, 6459, 6460, 6496, 6498, 6499, 6500, 6551, 6559, 6561, 6562, 6563, 6564, 6565, 6566, 6567, 6568, 6569, 6570, 7011, 7012, 7013, 7014, 7015, 7016, 7017. Appellee urged that the debates show that the primary evil with which Congress was concerned was the discrimination against independent producers of coal which had resulted from the acquisition by railroads, principally in the East, of coal mines. The conditions in the coal fields were undoubtedly a dramatic incentive to Congress to enact legislation seeking to prevent common carriers from occupying the dual and inconsistent position of common carrier and private shipper. But, as is usually the case where a particular evil may exist generally, Congress in enacting the Commodities Clause provided a general remedy.

Congress did, however, exempt timber and timber products. As the Court stated in *Tap Line Cases, supra* (pp. 27–28):

> While Congress in enacting the Commodities Clause amending §1 of the Act to Regulate Commerce (June 29, 1906, c. 3591, 34 Stat. 584) sought to divorce transportation from production and manufacture and to make transportation a business of and by itself unallied with manufacture and production in which a carrier was itself interested, the debates, which may be resorted to for the purpose of ascertaining the situation which prompted this legislation, show that

> the situation in some of the States as to the logging industry and transportation was sharply brought to the attention of Congress and led to the exemption from the Commodities Clause of timber and the manufactured products thereof, thus indicating the intention to permit a railroad to haul such lumber and products although it owned them itself. And that Congress had the constitutional power to enact such exemption was held in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 416–7. This declaration of public policy which is now part of the Commerce Act cannot be ignored in interpreting the power and authority of the Commission under the act. The discussion resulting in the action of Congress shows that railroads built and owned by the same persons who own the timber were regarded as essential to the development of the timber regions in the Southwest and the necessity of such roads was dwelt upon and set forth with ample illustration by Commissioner Prouty in his concurring opinion in this case.

And see *O'Keefe* v. *United States, supra,* p. 301.

Some of the very excerpts which appellee quoted from the debates show that various Senators called attention to the fact that not only in the lumber industry but also in other industries, many roads had been built by the industries in order to bring their products to connecting trunk line carriers, and they urged that a sweeping provision would cause seri-

ous injury to such industries. See, for example, iron industry (40 Cong. Rec. 6496); coal mining (40 Cong. Rec. 6460); lead and copper mining (40 Cong. Rec. 6563–6564, 6565).

The failure of Congress to exempt the products of these various industries transported by their own railroads and the express provision of exemption in favor of the lumber industry constitutes affirmative proof (if such proof were needed) that Congress intended that the Commodities Clause should apply, except in the case of the lumber industry, to transportation by all industrially owned railroads of the products of affiliated industrial corporations.[44]

Appellee urged below that the Senate "made a very definite and specific record" to the contrary when it rejected an amendment which was designed to make stock ownership in and of itself sufficient to render the transportation unlawful.[45] It was

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[44] Further evidence that Congress drew no distinction between industrially owned and other common carriers is found in the rejection by the Senate of amendments designed to limit the application of the Commodities Clause to carriers whose principal business was that of a common carrier (40 Cong. Rec., Pt. 7, 59th Cong., 1st sess., pp. 7015, 7016, 7017).

[45] The amendment referred to was as follows:

> After May 1, 1908 it shall be unlawful for any common carrier to engage in the transportation of interstate commerce if such common carrier shall at the time be interested, directly or indirectly, by stock ownership or otherwise, in the article or property which is the subject-matter of such commerce, or if it be interested at the time, directly or indirectly, by

partly upon the basis of the rejection of this amendment that this Court held in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 414–415, that mere ownership by a railroad of the stock of a producing company did not create the forbidden interest under the Commodities Clause. But, of course, the rejection of this amendment is no indication of any legislative intent that an industrially owned railroad should under no circumstances be deemed to have an interest within the Clause in the commodities owned by the affiliated industrial corporation. The subsequent Commodities Clause decisions make this clear (*supra*, pp. 116–118). The rejection of this amendment can certainly mean no more than that mere stock ownership is not suf-

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stock ownership or otherwise, in the mines or factories producing such commerce; or if at the time any officer, director, agent, or employee of such common carrier be interested, directly or indirectly, by stock ownership or otherwise, in the business of buying or selling such article or property which is the subject-matter of such commerce, or in the mines or factories producing the same; or if at the time stockholders owning more than 10 per cent of the capital stock of such common carrier be interested, directly or indirectly, in the business of buying or selling such article or property which is the subject-matter of such commerce, or in the mines or factories producing the same.

This section shall not prevent a common carrier from mining coal or carrying articles or property for its own use or for the use of its officers, directors, agents, employees, or stockholders (40 Cong. Rec., Pt. 7, 59th Cong., 1st sess., p. 7012).

ficient to create the forbidden interest.[46] As previously stated, the Government does not predicate this case upon mere stock ownership (*supra*, pp. 117–118).

(3) Construction by the Attorney General

Appellee made the startling assertion below that the Attorney General has construed the Commodities Clause as not applying at all to the transportation by an industrially owned common carrier railroad of the commodities of an affiliated industrial corporation. It would have been a noteworthy error indeed if the Attorney General had construed the clear language of the Commodities Clause as either exempting certain common carrier railroad companies or as exempting certain classes of com-

[46] Appellee makes a similar error in relying upon the fact that Congress failed to act on certain bills subsequently introduced to amend the Commodities Clause so as to provide, among other things, that stock ownership in and of itself should create the forbidden interest. These bills are H. R. 26983, 61st Cong., 2nd sess., introduced in the House on June 18, 1910 (45 Cong. Rec., Pt. 8, p. 8479); and H. R. 20470, 63rd Cong., 3rd sess., introduced in the House on December 31, 1914 (52 Cong. Rec., Pt. 1, p. 838). (Def. Exs. 32, 33, R. 124.) It is to be noted, moreover, that these bills were designed also to prohibit transportation even where the railroad did not have an interest in the commodities at the time of transportation, but had merely produced, owned, or had an interest in such commodities prior to transportation. It will be recalled that this Court, in the *Delaware & Hudson* case, *supra*, had construed the Commodities Clause as applying only where the railroad owned or had an interest in the commodities at the time of transportation.

modities in addition to those specifically excepted by Congress from the operation of the Clause. Had the Attorney General made such an error, his erroneous construction would obviously have no legal significance whatever. Clearly, an executive department of the Government may not construe an enactment of Congress so as to repeal it in part, or so as to make it conform to what the executive department deems desirable. As would be expected, an examination of the Attorney General's Annual Reports reveals that no such error was committed. The following are the places where we have been able to find discussion by the Attorney General of the Commodities Clause: Ann. Reports, Attorney General, Dec. 10, 1909, pp. 3–4; Dec. 10, 1910, pp. 6–7; Dec. 2, 1912, pp. 23–24; Dec. 1, 1913, pp. 25–26; Dec. 7, 1914, pp. 5–7, 22–23; Dec. 6, 1915, pp. 7–8; Dec. 4, 1916, pp. 7–8; Dec. 4, 1917, pp. 7–8; Dec. 5, 1927, pp. 26–27; Dec. 1, 1930, pp. 28–29 (present suit mentioned); Jan. 5, 1934, pp. 27–28 (present suit mentioned); Jan. 5, 1935, p. 30 (present suit mentioned); 29 Opinions, Attorney General, p. 587. Appellee quoted in its brief below isolated excerpts from some of the foregoing. Appellee's error is sufficiently demonstrated by the conclusion which appellee itself drew from these excerpts, namely, that the Attorneys General "have uniformly held that the Commodities Clause does not prohibit such ownership of railroads by indus-

trial companies." If the reports of the Attorney General show that, they only prove the obvious. We shall do no more than refer the Court to the above-enumerated passages in the Annual Reports. In a general way, it may be stated that most of the discussion of the Commodities Clause contained in the reports has to do with recommendations by the Attorney General for a thorough-going amendment of that statute. Such an amendment was felt to be necessary as a consequence of this Court's decision in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, particularly that part of the decision which construed the Commodities Clause as not prohibiting transportation of commodities produced by or under the authority of a railroad, where the railroad had parted with ownership or interest in such commodities before transportation had commenced. The Attorney General also deemed it essential that the Commodities Clause should be so amended as to make mere stock ownership sufficient to constitute the forbidden interest.[47]

[47] It would have been strange, indeed, if, as appellee seemed to suggest, the Attorney General had, even after the decision of this Court in the *Reading* case, *supra*, so construed the Commodities Clause as not being applicable to the transportation by a railroad subsidiary of a holding company of the commodities of producing subsidiaries of that company. The Attorney General could scarcely have failed to construe the Commodities Clause as this Court had construed and applied it in the *Reading* case.

CONCLUSION

It is respectfully submitted that the decree of the District Court should be reversed with directions to enter a decree in accordance with the prayer of the petition.

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